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06-783

No.

In the Supreme Court of the United States

LAWRENCE HOBBS, individually, *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When more than one defendant has been sued in a state-court civil case, federal courts are sharply divided on how to calculate the time for removal of the case from state court to federal court. It appears that most federal courts calculate the removal time from the date when the first defendant was served, under the "first-served defendant" rule. But many federal courts calculate the removal time from the date when the last defendant was served, under the "last-served defendant" rule.

The United States Supreme Court has never told lower federal courts what rule to follow, despite a decades-long split among federal trial and appellate courts.

Thus, the "question presented" is this:

Were the United States District Court for the District of Arizona and the United States Court of Appeals for the Ninth Circuit correct when they adopted the apparent minority position and held that the "last-served defendant" rule must be applied to calculate the time limit for removing a state-court civil case to federal district court?

PARTIES TO THE PROCEEDING

The parties to the proceeding before this Court are:

The plaintiffs in the state court case: Lawrence Hobbs, individually; Lawrence and Gloria Hobbs, husband and wife; and Tyler Hobbs, Jennifer Portillo, and Christine Hobbs, their children.

The respondent federal courts: The United States District Court of the District of Arizona and the United States Court of Appeals for the Ninth Circuit.

The real parties in interest, which are the original named defendants in the state court case: PacifiCorp, an Oregon corporation; and S.D. Myers, Inc., a foreign corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review certain orders of the United States District Court for the District of Arizona and of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

There are four related opinions and orders that Petitioners ask this Court to review. In reverse chronological listing, they are: (1) September 18, 2006 Order of the Ninth Circuit denying the petition for rehearing en banc; (2) July 26, 2006 Order of the Ninth Circuit denying the petition for writ of mandamus; (3) February 24, 2006 Order of the Untied States District Court for the District of Arizona denying the motion for certification for interlocutory appeal; and (4) January 17, 2006 Order of the United States District Court of the District of Arizona denying the motion to remand.

JURISDICTION

This Court has jurisdiction pursuant to ***28 U.S.C. § 1257(a)*** and ***Rule 13(a), Rules of the Supreme Court***, because the ultimate Order for which review is sought was filed by the United States Court of Appeals for the Ninth Circuit on September 18, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1441(a): Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant

or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

28 U.S.C. § 1441(a): Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1446(a): A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

28 U.S.C. § 1446(b): The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1447(c): A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

28 U.S.C. § 1651: The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

The start of the case: This lawsuit began with a fire and explosion. On May 8, 2004, Petitioner Lawrence Hobbs was a technician at the Cholla Power Plant, an electric generating

facility in Joseph City, Navajo County, Arizona.[1] Hobbs was walking near a large step-up transformer (Unit 4) when it caught fire and exploded, severely injuring him. Real Parties in Interest ("Defendants") owned, operated, and/or worked on Unit 4.

Petitioners sue Defendants in Arizona state court: On May 5, 2005, Petitioners sued Defendants in Maricopa County Superior Court, Phoenix, Arizona. Petitioners served the summons and complaint on the two proper named Defendants as follows: (a) S.D. Myers, Inc. was served on May 16, 2005; (b) PacifiCorp was served on May 24, 2005.[2] There was no federal question in the complaint or otherwise.

Notice of removal and motion to remand: On June 23, 2005, PacifiCorp filed a notice of removal to federal district court. This was more than 30 days after S.D. Myers was served, but within 30 days after service on PacifiCorp. On July 15, 2005, Plaintiffs filed their "Motion for Remand to Superior Court."

The district court's January 17, 2006 Order: Judge Bolton denied remand, noting that there was a decided split of authority on what rule to follow, since the removal statute did not specifically address whether to follow the "first-served" or the "last-served" rule.[3] As Judge Bolton held: "The first-served defendant rule, which has been followed by the Fifth

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[1] Joseph City is a small town about 78 miles east of Flagstaff, Arizona.

[2] Defendant PacifiCorp LLC was served on May 13, 2005, but it turned out that this unrelated entity was not involved in any of the events of this case, and thus was not a proper Defendant.

[3] ***Jan. 17, 2006 Order*** at 3, lines 3-5.

Circuit and a large number of district courts, states that the thirty-day removal deadline begins to run for all defendants as soon as any defendant is served with process. If the first-served defendant fails to remove the case within the thirty-day period, the right to removal will have been waived and the defendant will be foreclosed from joining any future removal attempts."[4]

On the "last-served" defendant rule, Judge Bolton wrote: "The later-served defendant rule, which has been adopted by the Sixth and the Eight Circuits and many district courts, states that each defendant has thirty days from the time of service to convince all earlier-served defendants to join a petition for removal."[5] Judge Bolton followed the "last-served" defendant rule, and denied the remand motion.

Motion for certification of the interlocutory appeal: Plaintiffs filed a motion for certification of interlocutory appeal" on January 20, 2006.

In her February 24, 2006 Order, Judge Bolton agreed that: "Circuits and district courts are deeply divided, and the Ninth Circuit (as well as several other circuits) have not yet provided an answer to this frequently recurring issue. Part of the reason for the courts' silence could be the issue's elusive nature on appeal. Parties (or appellate courts) appear unwilling to resolve the issue on interlocutory appeal, and it is seldom pursued following final judgment."[6] While

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[4] ***Jan. 17, 2006 Order*** at 3, lines 12-14, 17-19 (citations omitted).

[5] ***Jan. 17, 2006 Order*** at 3, lines 12-14, 17-19 (citations omitted).

[6] ***Feb. 24, 2006 Order*** at 2, lines 24-25; 3, lines 1-3 (citations omitted).

declining to certify the appeal, Judge Bolton strongly encouraged Plaintiffs to pursue this matter further:

> **I would love it if the Ninth Circuit would address the issue so that we would know, once and for all.** . . . I would love it if they would. It didn't seem to be one of the standards upon which I was supposed to certify an interlocutory appeal.
>
> So we didn't, but **if you want to pursue it, I would certainly encourage you to do so**, because the Ninth Circuit, I think, can apply whatever standard they think is appropriate even it it's a little different from the one we're required to follow.
>
> But I don't see any reason, while you're discussing all of that and determining whether you want to do that, to hold up the proceedings with this case, because even if the Ninth Circuit takes a look at it, what is done between now and when they may decide whether to take to case or not will be useful whether you're litigating here or back in state court.[7]

The three-judge panel denied the mandamus writ: On May 6, 2006, Petitioners filed a petition for writ of mandamus, which a three-judge panel of the United States Court of Appeals for the Ninth Circuit denied on July 25, 2006 (Exh. 4), in the following terms: "Petitioners have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus."

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[7] ***Reporter's Transcript of Proceedings*** at 5-6 (emphasis added) (Feb. 27, 2006).

The Ninth Circuit denied a petition for rehearing en banc: On August 2, 2006, Petitioners filed a Petition for Rehearing en banc with the Ninth Circuit. In an Order dated September 18, 2006, the Ninth Circuit denied the Petition for Rehearing en banc, ordering that "No further filings shall be accepted in this closed case." Petitioners then filed the present petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

There are compelling reasons to grant this Petition. Most important, this Court has never decided what rule to apply when calculating the removal time for a state-court case involving multiple defendants which are not all served with civil process on the same date. It's a simple problem that repeatedly arises and that can now be resolved. District courts in the Ninth Circuit – and federal appellate and trial courts across the nation – are split on what to do in such cases. Most appear to follow the "first-served defendant" rule. But many follow the "last-served defendant" rule.

This is a clear issue with an "A" or "B" answer. It is not an issue where it is sometimes "A" and sometimes "B," sometimes a combination of "A" and "B," and sometimes neither "A" nor "B." It is one or the other – but not both.

The United States Supreme Court has never told federal courts whether they should follow the "first-served defendant" rule or the "last-served defendant" rule. Doing both is impossible. Petitioners seek adoption of the "first-served defendant" rule, but, whether or not that rule is adopted, lower court confusion on the subject is endemic and should be ended. Petitioners thus ask this Court to state which rule the lower federal courts must follow.

The decision of the trial court to adopt the "last-served" defendant rule, and the Ninth Circuit's refusal to offer any guidance on what rule district courts in the Ninth Circuit should follow, were an abuse of discretion. This issue is so basic and important to the proper administration of justice – but so elusive and apt to evade review – that this Court should accept jurisdiction over the matter and announce a national rule for all federal courts to follow.

After all, once a case ends, a civil plaintiff's right to have the case litigated in state court is lost forever. This exasperating problem often arises and has deeply divided federal courts across the nation. But it persistently evades review. If this Court accepts jurisdiction over this vexing problem, it can be resolved once and for all. In addition, if this Court adopts the "first-served defendant" rule, Petitioners will be able to resume litigating this case in state court—where they filed it and where it should have remained.

I. THE "FIRST-SERVED DEFENDANT" RULE IS THE FAIREST AND MOST PRACTICAL RULE FOR THIS COURT TO ADOPT.

The "first-served defendant" rule is fairest and most practical because: (1) it best fits with the removal and remand process; (2) it resolves the proper forum for the case faster and with greater certainty; and (3) it best protects a plaintiff's choice concerning where the case should be litigated.

The removal process operates under strict guidelines: A defendant may only remove a civil state-court case to federal court if there is diversity or federal question jurisdiction. ***28 U.S.C. § 1441(a) & (b)***. But the defendant must comply with the removal standards of ***28 U.S.C. § 1446(b)***, the first paragraph of which requires a defendant to file a notice of

removal within thirty 30 days after receiving notice of a complaint revealing diversity or a substantial federal question. When there are multiple defendants, ***all defendants*** must join in the removal petition. The United States Supreme Court adopted this "unanimity rule" over a century ago.[8] Now, all federal courts follow the unanimity rule in regular removal cases.[9]

Under the "unanimity rule," any one defendant may prevent a case from being removed. If a defendant's removal notice fails to meet the timeliness or unanimity requirements of ***28 U.S.C. § 1446(b)***, the district court may remand the action upon a plaintiff's timely motion.[10] Courts strictly construe removal statutes against removal jurisdiction. Any doubt is resolved in favor of remanding the case.[11] Indeed, "strict construction is especially warranted in diversity cases, where concerns of comity mandate that state courts be

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[8] ***See, e.g., Chicago, Rock Island & Pacific Railway Co. v. Martin***, 178 U.S. 245, 248 (1900).

[9] ***See, e.g., Prize Frize, Inc. v. Matrix (U.S.) Inc.***, 167 F.3d 1261, 1266 (9th Cir. 1999); ***Parrino v. FHP, Inc.***, 146 F.3d 699, 703 (9th Cir. 1998). Congress recently abrogated the "unanimity rule" for certain class action lawsuits. ***See Abrego Abrego v. The Dow Chemical Co.***, 443 F.3d 676 (9th Cir. 2006). But that change does not affect the present case, which is ***not*** a class action.

[10] ***See 28 U.S.C. § 1447(c)*** ("A motion to remand the case on any basis other than subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a).").

[11] ***Gaus v. Miles, Inc.***, 980 F.2d 564, 566 (9th Cir.1992) ("We strictly construe the removal statute against removal jurisdiction. Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.") (citations omitted).

allowed to decide state cases unless the removal action falls squarely within the bounds Congress has created."[12]

The majority of courts have apparently adopted the "first-served defendant" rule and hold that the thirty-day removal period begins to run for all defendants on the date that the first defendant receives service of the state-court summons and complaint.[13] Courts have adopted the majority "first-served defendant" rule for three related reasons:

- The "first-served defendant" rule inevitably flows from the "unanimity rule;"
- Forum selection should be resolved as early as possible; and
- Removal statutes must be construed narrowly.

First, under the unanimity rule, all defendants must join a removal petition even though they have not received a copy

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[12] ***Hom v. Service Merchandise Co., Inc.***, 727 F. Supp. 1343, 1345 (N.D. Cal. 1990) (citation and internal quote marks omitted).

[13] ***United Computer Systems, Inc. v. AT & T Corp.***, 298 F.3d 756, 762 (9th Cir. 2002) (The "first-served" defendant rule "has been apparently adopted by the majority of courts that have addressed this issue.").

of the complaint.[14] In fact, the failure of a defendant to move for removal within the 30-day period is regarded as an irrevocable choice not to remove. "To hold otherwise would have the effect of extending the thirty-day limitation as applied to that defendant for an indefinite period."[15] Looked at from a different perspective, a defendant's failure to remove a case within thirty days operates as a waiver of the right to remove. Logically then, that defendant must be barred from consenting to a later-served defendant's removal notice, or there would be no unanimity.[16]

Second, courts applying the majority rule have emphasized the necessity that the forum selection should be settled as early as possible. Indeed, Congress has specified that, if removal does not occur within one year after commencement of the action in state court, it cannot be removed ever.[17] This is an implicit repudiation of the logic of

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[14] ***See Chicago, Rock Island & Pacific Railway Co. v. Martin***, 178 U.S. 245, 248 (1900); ***Embury v. King***, 361 F.3d 562, 563 n.1 ((9th Cir. 2004) (consent of all defendants required for removal). The only exception to the unanimity rule may be for parties who are nominal, unknown, or fraudulently joined. ***United Computer Systems, Inc. v. AT & T Corp.***, 298 F.3d 756, 762-63 (9th Cir. 2002). That exception does not apply here.

[15] ***Transport Indemnity Co. v. Financial Trust Co.***, 339 F. Supp. 405, 409 (C.D. Cal. 1972).

[16] ***Cantrell v. Great Republic Ins. Co.***, 873 F.2d 1249, 1254 (9th Cir. 1989) (Failure to remove within 30 days results in a waiver of the right to remove.).

[17] ***28 U.S.C. § 1446(b)***. ***See also Bush v. Cheaptickets, Inc.***, 425 F.3d 683, 688-89 (9th 2005) (discussing the one-year removal

the "last-served defendant" rule, which would sanction removal even if a defendant were served over a year after commencement of the state-court action.

Third, the rule requiring narrow construction of removal statutes supports the majority rule.[18] Indeed, the "defendant's right to remove and the plaintiff's right to choose the forum are not equal, and uncertainties are resolved in favor of remand."[19] Giving the earlier-served defendants another chance to obtain removal each time a new defendant is served with the summons and complaint creates a rolling deadline that will repeatedly reopen, even when a new defendant is added weeks or months after initial service on earlier-served defendants. That makes it ever harder for a plaintiff to keep the case where it started and belongs – in state court.

II. FEDERAL COURTS ARE SPLIT ON WHAT RULE TO FOLLOW.

Federal circuit courts and district courts are split on what rule to follow. In fact, within the Ninth Circuit itself, many

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limit); ***Hill v. Blind Industries and Services of Maryland***, 179 F.3d 754, 757 (9th Cir. 1999) ("Removal and remand are . . . governed by strict time limits.").

[18] ***See, e.g., Brown v. Demco, Inc.***, 792 F.2d 478 482 (5th Cir. 1986) ("[B]y restricting removal to instances in which the statute clearly permits it, the rule is consistent with the trend to limit removal and with the axiom that the removal statutes are to be construed against removal."); ***Duncan v. Stuetzle***, 76 F.3d 1480, 1485 (9th Cir. 1996).

[19] ***Wilds v. United Parcel Service, Inc.***, 262 F. Supp. 2d 163, 176 (S.D.N.Y. 2003).

district judged follow the "first-served defendant" rule,[20] while the "last-served defendant" rule is followed by other district judges, including Judge Susan Bolton in the Arizona federal district court case at issue in this Petition.[21]

But this is not just an intra-circuit problem plaguing only the Ninth Circuit. There is also a sharp inter-circuit divergence. The Fifth and Seventh Circuits appear to follow the "first-served defendant" rule.[22] The Fourth, Sixth, and Eighth Circuits apparently follow the "last-served defendant"

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[20] ***See, e.g., McAnally Enterprises, Inc. v. McAnally***, 107 F. Supp. 2d 1223 (C.D. Cal. 2000); ***Biggs Corp. v. Wilen***, 97 F. Supp. 2d 1040 (D. Nev. 2000); ***Teitelbaum v. Soloski***, 843 F. Supp. 614 (C.D. Cal. 1994); ***Samura v. Kaiser Foundation Health Plan, Inc.***, 715 F. Supp. 970, 971 (N.D. Cal. 1989); ***Pic-Mount Corp. v. Stoffel Seals Corp.***, 708 F. Supp. 1113 (D. Nev. 1989); ***Transport Indemnity Co. v. Financial Trust Co.***, 339 F. Supp. 405 (C.D. Cal. 1972); ***Morgan v. Asbestos Defendants (BHC)***, 2003 WL 945987 (N.D. Cal. Feb. 28, 2003); ***Ireland v. Checkerboard Square, LLC***, 2005 WL 43995 (Magistrate D. Or. Jan. 10, 2005), ***report and recommendation adopted by*** 2005 WL 372204 (D. Ore. Feb. 15, 2005); ***Innovacom, Inc. v. Haynes***, 1998 WL 164933 (N.D. Cal. March 17, 1998); ***Bewley v. Cigna Financial Advisors***, 1997 WL 601426 (N.D. Cal. Sept. 23, 1997).

[21] ***See, e.g., Griffith v. Am. Home Prods.***, 85 F. Supp.2d 995, 999 (E.D. Wash. 2000); ***Ford v. New United Motors Mfg.***, 857 F. Supp. 707, 708-10 (N.D. Cal. 1994).

[22] ***Brown v. Demco, Inc.***, 792 F.2d 478, 481 (5th Cir. 1986); ***Phoenix Container, L.P. v. Sokoloff***, 235 F.3d 352, 354 (7th Cir. 2000).

rule.[23] The other circuit courts of appeal do not appear to have selected a rule.

District courts across the nation, moreover, can be found resting on both sides of the fence: many follow the "first-served defendant" rule,[24] while others use the "last-served

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[23] ***McKinney v. Board of Trustees***, 955 F.2d 924 (4th Cir. 1992); ***Brierly v. Alusuisse Flexible Packaging, Inc.***, 184 F.3d 527, 533 (6th Cir. 1999); ***Marano Enterprises of Kansas v. Z-Teca Restaurants, L.P.***, 254 F.3d 753 (8th Cir. 2001).

[24] ***Phoenix Container, L.P. v. Sokoloff***, 83 F. Supp. 2d 928 (N.D. Ill. 2000) ("first-served defendant" rule); ***Cellport Systems, Inc. v. Peiker Acustic GMBH & Co. KG***, 335 F. Supp. 2d 1131 (D. Colo. 2004) ("first-served defendant" rule); ***Auchinleck v. Town of LaGrange***, 167 F. Supp. 2d 1066 (E.D. Wis. 2001) ("first-served defendant" rule); ***Biggs Corp. v. Wilen***, 97 F. Supp. 2d 1040 (D. Nev. 2000) ("first-served defendant" rule).

defendant" rule,[25] often in the same judicial circuit.[26] It is a shambles.

Only two things are certain. First, one side or the other is having its rights trampled, although, because this Court has never selected what rule to follow, we cannot know for sure which side is suffering. Second, this Court can end the confusion by accepting this Petition and telling the lower courts what rule they must follow.

III. THE INTERLOCUTORY ROAD PETITIONERS TRAVELLED TO ARRIVE HERE – AND WHY THEY SHOULD STAY.

This appeal started with the district judge's denial of a motion to remand, followed by her refusal to certify her denial of the motion for remand for an interlocutory appeal,

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[25] ***Ratliff v. Workman***, 274 F. Supp. 2d 783 (S.D.W. Va. 2003) ("last-served defendant" rule.); ***Shadie v. Aventis Pasteur, Inc.***, 254 F. Supp. 2d 509 (M.D. Pa. 2003) ("last-served defendant" rule); ***Piacente v. State University of New York at Buffalo***, 362 F. Supp. 2d 383 (W.D.N.Y. 2004) ("last-served defendant" rule); ***Orlick v. J.D. Carton & Son, Inc.***, 144 F. Supp. 2d 337 (D.N.J. 2001) ("last-served defendant" rule).

[26] ***Compare Smola v. Trumbull Ins. Co.***, 317 F. Supp. 2d 1232 (D. Colo. 2004) (district court in the Eighth Circuit following "first-served defendant" rule) ***with Hartford Steam Boiler Inspection and Ins. Co. v. Riviera Elec. LLC***, 2006 WL 1046962 (D. Colo. 2006) (district court in the Eighth Circuit following "last-served defendant" rule). ***Compare Kuhn v. Brunswick Corp.***, 871 F. Supp. 1444, 1447 (N.D. Ga. 1994) (district court in Eleventh Circuit following "first-served defendant" rule) with ***Collings v. E-Z Serve Convenience Stores, Inc.***, 936 F.Supp. 892, 893-95 (N.D. Fla. 1996) (district court in Eleventh Circuit following "last-served defendant" rule).

because she thought that the case was not sufficiently extraordinary.

The Ninth Circuit Court of Appeals then declined to grant a writ of mandamus to tell this Arizona federal district court – and all other district courts of the Ninth Circuit – what rule must be followed in such cases. This was unexpected and an abuse of discretion, since the Ninth Circuit routinely finds "extraordinary" circumstances in cases concerning the allegedly improper denial of motions to remand. It has allowed interlocutory appeals in a number of such cases.[27]

These courts apparently concluded that the case was not so "extraordinary" that appellate guidance was needed. This is, however, as extraordinary a case as the law can envision, because such remand issues are almost completely non-reviewable. After all, once the primary case is resolved in federal court, the plaintiff whose case was removed from state court has no viable remedy. How can a plaintiff show that he or she was prejudiced by having the case decided in federal as opposed to state court?

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[27] ***See, e.g., Sheeran v. General Electric Co.***, 593 F.2d 93, 97 (9th Cir. 1979), ***cert. denied***, 444 U.S. 868 (1979); ***Lee v. American National Insurance Co.***, 260 F.3d 997, 1000 (9th Cir. 2001), ***cert. denied***, 535 U.S. 928 (2002); ***Sullivan v. First Affiliated Sec., Inc.***, 813 F.2d 1368, 1371 (9th Cir. 1987), ***cert. denied***, 484 U.S. 850 (1987); ***ARCO Environmental Remediation, L.L.C. v. Department of Health and Environmental Quality of Montana***, 213 F.3d 1108, 1111, 1117-18 (9th Cir. 2000). Other circuit courts similarly allow interlocutory appeals from orders denying motions to remand. ***See, e.g., City of Clarksdale v. BellSouth Telecommunications, Inc.***, 428 F.3d 206, 208-10 (5th Cir. 2005); ***Watson v. Philip Morris Companies, Inc.***, 420 F.3d 852, 854 (8th Cir. 2005).

And yet there is a difference – however elusive or non-quantifiable that difference may sometimes be. In fact, the federal system of government rests on the fundamental premise that the federal and state governmental systems are different. "Diversity not only in policy, but in the means of implementing policy, is the very ***raison d'être*** of our federal system."[28]

As far as lawsuits arising under state laws, state-court judges are clearly authorities on substantive state law – they do not need to guess or predict what it may be. Further, state-court procedures – at least in Arizona superior court – are faster and less cumbersome. Separate systems are always, in logic and precedent, inherently unequal.[29] They are also, in this case, unequal as a practical matter.

That is why this case is so extraordinary. If this issue is not settled before the case is over, the Petitioners will have been deprived of their right to litigate their case in state court. The Ninth Circuit's refusal even to consider this matter was therefore a clear abuse of discretion.

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[28] ***Harmelin v. Michigan***, 501 U.S. 957, 990 (1991). "It is in the nature of a federal system that different states will apply different rules of law, based on their individual perceptions of what is in the best interests of their citizens." ***In re Agent Orange Product Liability Litigation***, 635 F.2d 987, 994 (2nd Cir. 1980), ***cert. denied***, 454 U.S. 1128 (1981).

[29] ***See, e.g., Regents of University of California v. Bakke***, 438 U.S. 265, 327 (1978) (Brennan, J., concurring in relevant part) (Separate public facilities of all sorts are "inherently unequal.").

CONCLUSION

No offense intended, but Petitioners do not want to be in federal court. Arizona superior courts are better-equipped and better-able to handle a case that depends on state law for its resolution. Moreover, once back in state court, the case, because of the caseload of the federal district court, will be resolved quicker. That is true even with this detour into the federal appellate system. As this Court has acknowledged, any separate governmental systems are inherently unequal. Petitioners filed this case in state court in the first place because they believe that it is better to litigate this case there. Indeed, it was their right to file this case there. And under the "first-served defendant" rule, it is their right to have this case remanded back to state court.

The "first-served defendant" rule is the one that this Court should adopt, because it is the fairest rule and comports best with the overall structure and intent of the removal statutes. At a minimum, however, this Court should accept the Petition and tell the lower federal courts what rule they are to follow, even if it is a different rule than the one that the Petitioners seek.

Petitioners respectfully ask the Court to grant the Petition for Writ of Certiorari, and to order the remand of this case to Maricopa County Superior Court, State of Arizona.

Respectfully Submitted,

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November 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-72379
D.C. No. CV-05-01906-SRB

[Filed September 18, 2006]

In re: LAWRENCE HOBBS.	)
	)
LAWRENCE HOBBS, individually; et al.,	)
Petitioners,	)
	)
v.	)
	)
UNITED STATES DISTRICT COURT	)
FOR THE DISTRICT OF ARIZONA,	)
Respondent,	)
	)
PACIFICORP, an Oregon Corp; et al.,	)
Real Parties in Interest.	)
	)

Before: B. FLETCHER, HAWKINS and THOMAS, Circuit Judges.

ORDER

The "petition for rehearing en banc" is construed as a motion for reconsideration and for reconsideration en banc of

the July 25, 2006 order denying the petition for a writ of mandamus. So construed, the motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings shall be accepted in this closed case.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-72379
D.C. No. CV-05-01906-SRB

[Filed July 25, 2006]

In re: LAWRENCE HOBBS.	)
	)
LAWRENCE HOBBS, individually; et al.,	)
Petitioners,	)
	)
UNITED STATES DISTRICT COURT	)
FOR THE DISTRICT OF ARIZONA,	)
Respondent,	)
	)
PACIFICORP, an Oregon Corp; et al.,	)
Real Parties in Interest.	)
	)

Before: B. FLETCHER, HAWKINS and THOMAS, Circuit Judges.

ORDER

Petitioners have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. United States Dist.*

Court, 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. CV-05-1906-PHX-SRB

[Filed February 24, 2006]

Lawrence Hobbs individually; Lawrence and Glora Hobbs, husband and wife; Tyler Hobbs, Jennifer Portillo, and Christine Hobbs, children, Plaintiffs,	)
vs.	)
Pacificorp, an Oregon corporation; Pacificorp, L.L.C., a Delaware corporation; S.D. Myers, Inc., a foreign corporation, Defendants.	)

ORDER

On January 17, 2006, the Court issued an Order denying Plaintiffs' motion to remand (Doc. 14). The Order addressed the question of whether to apply the first-served defendant rule or the later-served defendant rule,[1] a question about

[1] As the Order stated, "The removal statute does not specifically address whether, in cases involving multiple defendants, each defendant has thirty days in which to remove the case, known as

which the Supreme Court and the Ninth Circuit are silent, and about which other circuits, as well as district courts within the Ninth Circuit, are split. *See* Order at 3-5. The Court came down on the side of the later-served defendant rule. *See* Order at 6-7. Plaintiffs now ask the Court to certify their interlocutory appeal. (Doc. 16.)

I. LEGAL STANDARDS AND ANALYSIS

28 U.S.C. § 1292 sets forth the standards which district courts must apply in deciding whether to certify interlocutory appeals. The statute provides, in relevant part,

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves [1] a controlling question of law [2] as to which there is substantial ground for difference of opinion and [3] that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

In applying these three factors to the case at hand, the Court is mindful that the certification of interlocutory appeals is a mechanism to be employed sparingly and only in "extraordinary cases where decision of an interlocutory appeal might avoid protracted and expensive litigation." *U.S. Rubber Co. v. Wright,* 359 F.2d 784, 785 (9th Cir. 1966) (per curiam) (reviewing the legislative history of 28 U.S.C. § 1292(b)). *See In re Cement Antitrust Litig.*, 673 F.2d 1020,

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the 'later-served' defendant rule, or whether removal must occur within thirty days of when the first defendant was served, known as the 'first-served' defendant rule." Court's Order dated January 17, 2006 (hereafter, "Order") at 2 (citations omitted).

1026 (9th Cir. 1982) (quoting *Coopers & Lybrand v. Livesay*, 473 U.S. 463, 475, 98 S. Ct. 2454, 2461 (1978) (an "appellant 'still has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment'")); *Loritz v. CMT Blues*, 271 F. Supp. 2d 1252, 1253-54 (S.D. Cal. 2003).

The second prong of the statute supplies the most compelling reason for certification. There is not only the potential for "difference of opinion," it is the reality across the country. Circuits and district courts are deeply divided, and the Ninth Circuit (as well as several other circuits) have not yet provided an answer to this frequently recurring issue. *United Computer Sys., Inc. v. AT& T Corp.*, 298 F.3d 756, 762-63, n.1 (9th Cir. 2002) (acknowledging split of authority and expressly declining to resolve the issue). Part of the reason for the appellate courts' silence could be the issue's elusive nature on appeal. Parties (or appellate courts) appear unwilling to resolve the issue on interlocutory appeal, and it is seldom pursued following final judgment. *See Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75, 117 S. Ct. 467, 476 (1996) (holding that once a diversity case in a federal court has reached final judgment, that judgment will not be reversed on appeal due to defects in the removal procedure, as long as those defects are statutory, not jurisdictional). It is the combination of this issue's elusiveness on appeal and frequency of recurrence at the trial court level that make it well-suited for resolution by interlocutory appeal.

However, satisfaction of the second prong alone is insufficient to warrant the certification of an issue for interlocutory appeal. Plaintiffs encounter problems fulfilling the first and third prongs. Under the first prong, a "question of law" is "controlling" if "resolution of the issue on appeal

could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.2d at1026 (citing *U.S. Rubber Co.*, 359 F.2d at 785)). Plaintiffs argues that a reversal of the Order denying remand would "materially affect the outcome of litigation" by terminating it. The Court disagrees. However this appeal was resolved, it would have no effect on the outcome of the case, only the forum where the case was litigated. Reversal of the Order denying remand would mean that the case proceeds in state court; affirmance would mean it proceeds in this Court. Either way, the case is governed by Arizona personal injury law.

Under the third prong, district courts must inquire into whether "an immediate appeal from the order may materially advance the ultimate termination of the litigation." Here, certification will inevitably delay the litigation. If the Ninth Circuit takes the case and affirms the Court's Order, then the case will proceed in the district court, delayed by the time it took for the Ninth Circuit to decide the appeal. If the Ninth Circuit takes the case and reverses, then the case will proceed in the state court, also delayed by the time it took for the Ninth Circuit to decide the appeal. Either way, appeal would not hasten the ultimate termination of this litigation.

On balance, the Court believes that although there are excellent reasons that this issue should be resolved on interlocutory appeal, a faithful interpretation of 28 U.S.C. § 1292 precludes that method of resolution. Plaintiffs' motion is denied.

IT IS ORDERED denying Plaintiffs' Motion for Certification of Interlocutory Appeal. (Doc. 16).

IT IS FURTHER ORDERED granting Plaintiffs Motion for Expedited Consideration of Interlocutory Appeal (Doc. 17).

DATED this 24th day of February, 2006.

/s/ Susan R. Bolton
Susan R. Bolton
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR DISTRICT OF ARIZONA

No. CV-05-1906-PHX-SRB

[Filed January 17, 2006]

Lawrence Hobbs individually; Lawrence and Glora Hobbs, husband and wife; Tyler Hobbs, Jennifer Portillo, and Christine Hobbs, children, Plaintiffs,	)
vs.	)
Pacificorp, an Oregon corporation; Pacificorp, L.L.C., a Delaware corporation; S.D. Myers, Inc., a foreign corporation, Defendants.	)

ORDER

At issue is Plaintiffs' motion for remand pursuant to 28 U.S.C. § 1447(c). (Doc. 8). For the reasons that follow, the motion is denied.

I. BACKGROUND

Plaintiffs Lawrence Hobbs, Gloria Hobbs, Tyler Hobbs, Jennifer Portillo, and Christine Hobbs filed this tort action in

Superior Court of the State of Arizona on May 5, 2005. Plaintiffs allege Defendants' negligence and misconduct resulted in a transformer fire and explosion on May 8, 2003, that caused Plaintiff Lawrence Hobbs to suffer second and third degree burns. The original Complaint named S.D. Myers, Inc. ("S.D. Myers") and PacifiCorp L.L.C. as Defendants.

S.D. Myers was served with the original Complaint on May 13, 2005, and service was at least attempted on PacifiCorp, L.L.C. on May 16, 2005, though there is no evidence that this was actually accomplished. On May 24, 2005, the Complaint was amended, adding PacifiCorp as a defendant.[1] The Amended Complaint was served on Pacificorp on May 24, 2005, and on S.D. Myers on May 25, 2005.

On June 23, 2005, PacifiCorp and PacificCorp LLC filed a notice of removal with this Court pursuant to 28 U.S.C. § 1332 on the basis of diversity of citizenship, and S.D. Myers consented to the removal on the same day. Plaintiffs now move to remand the case, arguing that the notice of removal was untimely. Additionally, Plaintiffs seek attorney's fees and costs pursuant to 28 U.S.C. § 1447(c).

II. LEGAL STANDARDS AND ANALYSIS

Because S.D. Myers did not attempt to remove this action within thirty days of being served with the original Complaint, Plaintiffs argue that the notice of removal was

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[1] PacifiCorp and PacifiCorp, L.L.C. have both filed affidavits stating that PacifiCorp, L.L.C. is in no way affiliated or associated with PacifiCorp and was not a party to the alleged tortious acts. (Monson Aff. ¶ 4,6; O'Connor Aff. ¶ 3-5).

untimely. Defendants argue that each defendant has thirty days from the date of service in which to file a notice of removal and obtain joinder firom all other defendants.

The procedure for removing state actions to federal court is governed by 28 U.S.C. § 1446. The removal statute states that "notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based. . . ." 28 U.S.C. § 1446(b).

The removal statute does not specifically address whether, in cases involving multiple defendants, each defendant has thirty days in which to remove the case, known as the "later-served" defendant rule, or whether removal must occur within thirty days of when the first defendant was served, known as the "first-served" defendant rule. *Ratliff v. Workman,* 274 F. Supp. 2d 783,784 (S.D. W. Va. 2003); *Smith v. Mail Boxes, Etc. USA, Inc.,* 191 F. Supp. 2d 1155, 1158 (E.D. Cal. 2002); *United Traffic Consultants, Inc. v. Premium Logistics, Inc.,* 2001 WL 34039477, at *3 (D. Or. Nov. 16, 2001); *Biggs Corp. v. Wilson,* 97 F. Supp. 2d 1040, 1043 (D. Nev. 2000). Neither the Supreme Court of the United States nor the Ninth Circuit have ever addressed this issue. Within the Ninth Circuit, the District Courts are split regarding whether to apply the first-served defendant rule or the last-served defendant role. *See e.g., United Traffic Consultants, Inc.,* 2001 WL 34039477 at *3; *Biggs Corp.* F. Supp. 2d at 1043; *Griffith v. Am. Home Prods.,* 85 F. Supp. 2d 995, 999 (E.D. Wash. 2000); *Ford v. New United Motors Mfg.,* 857 F. Supp. 707, 708-10 (N.D. Cal. 1994); *Samura v. Kaiser,* 715 F.

Supp. 970, 971 (N.D. Cal. 1989). This is the first time this issue has been considered in the District of Arizona.[2]

A. First-Served Defendant Rule

The first-served defendant rule, which has been followed by the Fifth Circuit and a large number of district courts, states that the thirty day removal deadline begins to run for all defendants as soon as any defendant is served with process. *See, e.g., Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1262-63 (5th Cir. 1988); *Brown v. Demco, Inc.*, 792 F.2d 478, 482 (5th Cir. 1986); *Smith*, 191 F. Supp. 2d at 1158; *Biggs*, 97 F. Supp. 2d at 1044; *Griffith*, 85 F. Supp. 2d at 999. If the first-served defendant fails to remove the case within the thirty day period, the right to removal will have been waived and the defendant will be foreclosed from joining any future removal attempts. *See, e.g., Getty*, 841 F.2d at 1263; *Brown*, 792 F.2d at 482; *Biggs*, 97 F. Supp. 2d at 1044; *Faulk v. Superior Industry*, 851 F. Supp. 457, 458 (M.D. Fla. 1994). Thus, because of the unanimity

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[2] Plaintiffs incorrectly argue that the first-served defendant rule was applied in *Schwartz v. FHP International Corporation*. 947 F. Supp. 1354 (D. Ariz. 1996). In *Schwartz*, the District Court held that the first-served defendant, who had timely filed a notice of removal, was required to obtain the consent of another defendant who, though not yet having been served with process, had filed an answer to the complaint. *Schwartz*, 947 F. Supp. at 1363. Thus, the case was decided on the unanimity requirement, not the first-served defendant rule. Even if *Schwartz* was decided under the first-served defendant rule, that case does not constitute binding authority on this Court.

requirement,[3] removal is prohibited for all defendants when the first-served defendant rule is applied.

In *Brown v. Demco,* 792 F.2d 478,480 (5th Cir. 1986), the Fifth Circuit adopted the first-served defendant role. In that case, the last-served defendant filed a notice of removal with the consent of the other defendants and within thirty days of being served, but more than four years from the start of the litigation. *Id.* The court reasoned that the first-served defendant rule "follows logically from the unanimity requirement," and comports with "the trend to limit removal jurisdiction and with the axiom that removal statutes are to be strictly construed against, removal." *Id.* at 481. As to the criticism that the first-served defendant rule is unfair to later-served defendants, the court stated,

> [W]e do not perceive the suggested unfairness to the subsequently added defendant who is merely not granted an opportunity that might have been available to others. A defendant who is added to a case in which a co-defendant has failed to seek removal is in no worse position than it would have been in if the co-defendant had opposed removal or were domiciled in the same state as the plaintiff. To permit the defendants in this case to obtain removal after they have tested state-court waters for four years would give them a second opportunity to forum-shop and further delay the progress of the suit. The unfairness

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[3] The unanimity, requirement states that for removal to be valid, all defendants, except nominal or formal parties, must consent to and join in the petition for removal. 28 U.S.C. § 1446(c); *Brown,* 792 F.2d at 481; *Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressmen and Assistants' Loca1349,* 427 F.2d 325, 326-27 (5th Cir. 1970); *Biggs,* 97 F. Supp. 2d at 1044 n.3.

> of this to the plaintiff outweighs the unfairness, if any, to the last-joined defendant. The forum for a suit ought to be settled at some time early in the litigation.

Id. The Fifth Circuit reaffirmed its holding in *Getty Oil Corporation v. Insurance Company of North America,* noting that the first-served defendant rule "promotes unanimity among the defendants without placing undue hardships on subsequently served defendants." 841 F.2d at 1263.

B. Later-Served Defendant Rule

The later-served defendant rule, which has been adopted by the Sixth and the Eight Circuits and many district courts, states that each defendant has thirty days from the time of service to convince all earlier-served defendants to join a petition for removal. *Marano Enters. of Kan. v. Z-Teca Rests., L.P.,* 254 F.3d 753, 755-57 (8th Cir. 2001); *Brierly v. Alusuisse Flexible Packaging Inc.,* 184 F.3d 527, 533 (6th Cir. 1999).

One rationale for this rule is that it is more faithful to the language of the removal statute. In *Brierly v. Alusuisse Flexible Packaging Inc.,* the Sixth Circuit stated that, "as a matter of statutory construction, holding that the time for removal commences for all purposes upon service of the first defendant would require us to insert "first" before "defendant" into the language of the statute... If Congress had intended the 30-day removal period to commence upon service of the first defendant, it could have easily so provided." 184 F.3d at 533.

The later-served defendant rule has also been defended on the basis of fairness. In *McKinney v. Board of Trustees of Maryland Community College,* the Fourth Circuit reasoned

that "the removal procedure is intended to be fair to both plaintiffs and defendants alike." 955 F.2d 924, 927 (4th Cir. 1992) (punctuation and quotations omitted). By adopting the first-served defendant rule,

> [T]he rights of defendants could rather easily be overcome by tactical maneuvering by plaintiffs. Suppose, for example, plaintiff serves defendant A, thus starting the thirty-day period running, and then maneuvers to serve defendant B late on the thirtieth day. Obviously B is unlikely to rush to the courthouse door before it closes to file his joinder of A's removal petition; he is unlikely to even realize what is happening to him before it is too late. (There is nothing on the summons form such a defendant would receive-which of course would be a summons to state, not federal, court-that would tell him the rules for removal to federal court, or warn him that he might have much less than thirty days to join in a removal petition). This cannot be what Congress had in mind. Congress created the removal process to protect defendants. It did not extend such protection with one hand, and with the other give plaintiffs a bag of tricks to overcome it.

Id. at 928.

C. The Present Case

The Court believes that the language of the removal statute, Congress' intent in enacting the statute, as well as considerations of fairness are better served by the later-served defendant rule. While it is true that the removal statute should be "strictly construed against removal," *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100, 108-09, 61 S. Ct. 868, 872

(1914), the statute should not be accorded an interpretation that contradicts its plain language. The Court finds itself in agreement with the Sixth Circuit that to adopt the first-served defendant rule is to insert the word "first" before "defendant" in the removal statute. *Brierly,* 184 F.3d at 533. Had Congress wished the statute to be triggered by service upon the first defendant, it could have explicitly said so.

Further, as stated by the court in *McKinney,* it is illogical to think that Congress would grant defendants the power to remove a case to federal court and at the same time allow plaintiffs to subvert that power. Congress' concern about fairness towards defendants is also evident in 28 U.S.C. § 1448, which ensures that defendants served after removal have an opportunity to seek remand.

Finally, the Court does not believe that the later-served defendant rule undercuts the well-founded need to settle the appropriate forum as early in the case as possible. A plaintiff that wishes to cement its forum choice early in the case should simply serve all named defendants early in the case, thereby preventing the problem of removal by a later-served defendant.

In the present case, PacifiCorp filed a timely petition for removal within thirty days of first being served. To prevent S.D. Myers from joining the removal petition would eliminate PacificCorp's opportunity to remove the action and vitiate the intent of the removal statute. PacificCorp's petition for removal was valid under the later-served defendant rule. Therefore, Plaintiffs' motion for remand is denied. Attorneys' fees and costs will not be awarded.

IT IS ORDERED denying the Plaintiffs' motion for remand. (Doc. 8).

DATED this 17th day of January, 2006.

/s/ Susan R. Bolton
Susan R. Bolton
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 06-72379
U.S. Ct. Appeals Docket 06-72379
D.C. No. CV-05-01906-SRB

[Filed August 1, 2006]

In re: LAWRENCE HOBBS.	)
	)
LAWRENCE HOBBS, individually; et al.,	)
Plaintiffs-Petitioners,	)
	)
v.	)
	)
UNITED STATES DISTRICT COURT	)
FOR THE DISTRICT OF ARIZONA,	)
Respondent,	)
	)
PACIFICORP, an Oregon corp.; et al.,	)
Real Parties in Interest.	)
	)

PLAINTIFFS-PETITIONERS' PETITION
FOR REHEARING EN BANC

STATEMENT OF COUNSEL ON
BASIS FOR PETITION

Under ***Rule 35(b), Fed. R. App. Proc.,*** Counsel for Petitioners ("Plaintiffs") submit that two factors warrant rehearing en banc of this removal case.

First, the full Court should act because this issue evades review. The issue is the proper way to remove a case. When there are more than one defendants, there are two rules: (1) the "first-served" defendant rule; and (2) the "last-served" defendant rule. Under the first, PacifiCorp's notice of removal was untimely; under the last, notice of removal was timely, and bars remand. Judge Bolton denied remand, adopting the "last-served" defendant rule. She declined to certify for an interlocutory appeal, but encouraged filing a writ of mandamus.

Neither the Supreme Court ***nor*** this Court has ***ever*** decided what rule to follow. District courts in our Circuit - and courts across the nation - are split. This Court, en banc, should accept this Petition because this issue has evaded review in our Circuit for decades. The July 25, 2006 Order ***(see*** Exh. 4) denying mandamus was an abuse of discretion because the issue is ***"extra***-ordinary" - since there is no other way to resolve this issue than by appellate review ***before*** a case ends. Once a case ends, plaintiffs right to have the case litigated in the state court is lost forever. This exasperating problem often arises, has deeply divided this Circuit's district courts, and should be resolved now.

Second, this is a clear issue with an "A" or "B" answer. It is not an issue where it is sometimes "A" and sometimes "B," sometimes a combination of"A" and "B," and sometimes neither "A" nor "B." It is one or the other, but not both.

This Court either follows the "first-served" defendant rule or it follows the "last-served" defendant rule. Doing both would be impossibly absurd. It is time for the Court to choose which rule to follow and to end the confusion.

FACTUAL AND PROCEDURAL BACKGROUND

1. The "Unit 4" fire and explosion: On May 8, 2004, Lawrence Hobbs was a technician at the Cholla Power Plant, an electric generating facility in Joseph City, Navajo County, Arizona.[1] Hobbs was walking near a large generator and transformer (Unit 4) when it caught fire and exploded, severely injuring Hobbs. Real Parties in Interest ("Defendants") owned, operated, and/or worked on Unit 4.

2. Plaintiffs sue Defendants in Arizona state court: On May 5, 2005, Plaintiffs sued Defendants in Maricopa County Superior Court, Phoenix, Arizona. Plaintiffs served the summons and complaint on the two proper named Defendants as follows: (a) S.D. Myers, Inc. was served on May 16, 2005; (b) PacifiCorp was served on May 24, 2005.[2]

3. Notice of removal and motion to remand: On June 23, 2005, PacifiCorp filed a notice of removal to federal district court. This was more than 30 days after S.D. Myers was served, but within 30 days after service on PacifiCorp. On July 15, 2005, Plaintiffs filed their "Motion for Remand to Superior Court."

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[1] Joseph City is a small town about 78 miles east of Flagstaff, Arizona.

[2] Defendant PacifiCorp LLC was served on May 13, 2005, but it turned out that this unrelated entity was not involved in any of the events of this case, and thus was not a proper Defendant.

4. The district court's January 17, 2006 Order: Judge Bolton denied remand, noting that there was a decided split of authority on what rule to follow, since the removal statute did not specifically address whether to follow the "first-served" or the "last-served" rule..[3] "The first-served defendant rule, which has been followed by the Fifth Circuit and a large number of district courts, states that the thirty-day removal deadline begins to run for all defendants as soon as any defendant is served with process. If the first-served defendant fails to remove the case within the thirty-day period, the right to removal will have been waived and the defendant will be foreclosed from joining any future removal attempts."[4]

On the "last-served" defendant rule, she wrote: "The later-served defendant rule, which has been adopted by the Sixth and the Eight Circuits and many district courts, states that each defendant has thirty days from the time of service to convince all earlier-served defendants to join a petition for removal."[5] Judge Bolton followed the "last-served" defendant rule, and denied the remand motion.

5. Motion for certification of the interlocutory appeal: Plaintiffs filed a motion for certification of interlocutory appeal" on Jan. 20, 2006. In her Feb. 24, 2006 Order, Judge Bolton agreed that: "Circuits and district courts are deeply divided, and the Ninth Circuit (as well as several other circuits) have not yet provided an answer to this frequently

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[3] Exh. 1, ***Jan. 17, 2006 Order*** at 3, lines 3-5.

[4] Exh. 1, ***Jan. 17, 2006 Order*** at 3, lines 12-14, 17-19 (citations omitted).

[5] Exh. 1, ***Jan. 17, 2006 Order*** at 3, lines 12-14, 17-19 (citations omitted).

recurring issue. Part of the reason for the courts' silence could be the issue's elusive nature on appeal. Parties (or appellate courts) appear unwilling to resolve the issue on interlocutory appeal, and it is seldom pursued following final judgment."[6] While declining to certify the appeal, Judge Bolton strongly encouraged Plaintiffs to pursue this matter further:

> **I would love it if the Ninth Circuit would address the issue so that we would know, once and for all...** I would love it if they would. It didn't seem to be one of the standards upon which I was supposed to certify an interlocutory appeal.
>
> So we didn't, but **if you want to pursue it, I would certainly encourage you to do so,** because the Ninth Circuit, I think, can apply whatever standard they think is appropriate even it it's a little different from the one we're required to follow.
>
> But I don't see any reason, while you're discussing all of that and determining whether you want to do that, to hold up the proceedings with this case, because even if the Ninth Circuit takes a look at it, what is done between now and when they may decide whether to take to case or not will be useful whether you're litigating here or back in state court.[7]

6. The three-judge panel denied the mandamus writ: Plaintiffs filed a petition for writ of mandamus, which a three-judge panel of this Court denied on July 25, 2006 (Exh. 4):

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[6] Exh. 2, ***Feb. 24, 2006 Order*** at 2, lines 24-25; 3, lines 1-3 (citations omitted).

[7] Exh. 3, ***Reporter's Transcript of Proceedings*** at 5-6 (emphasis added) (Feb. 27, 2006).

"Petitioners have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus." This *is* an ***extraordinary*** issue that has evaded review, and needs resolution.

STANDARD OF REVIEW

The writ of mandamus is an extraordinary remedy.[8] A five-factor test is used to evaluate the propriety of a writ of mandamus under ***28 U.S.C. § 1651:***

> (1) Petitioner has no other adequate means, such as a direct appeal, to attain the desired relief.
>
> (2) Petitioner will be damaged or prejudiced in a way not correctable on appeal.
>
> (3) The district court's order is clearly erroneous as a matter of law.
>
> (4) The district court's order is an often-repeated error, or manifests a persistent disregard of the federal rules.
>
> (5) The district court's order raises new and important problems, or issues of law of first impression.[9]

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[8] ***Kerr v. U.S. Dist. Ct. for the N. Dist. of Cal.***, 426 U.S. 394, 402 (1976).

[9] ***Bauman v. U.S. Dist. Ct. for the N. Dist. of Cal.***, 557 F.2d 650, 654-55 (9th Cir. 1977).

"[I]t is clear that the third factor, the existence of clear error as a matter of law, is dispositive."[10] All factors militate in favor of accepting this writ.

THE ISSUE

In removal cases, does the Ninth Circuit Court of Appeals follow the "first-served" defendant rule or the "last-served" defendant rule?

LEGAL ARGUMENT

A. This is an extra-ordinary case where circuit-wide guidance is needed.

"Existence of a clear error as a matter of law" is ***the*** dispositive factor for evaluating a petition for writ of mandamus.[11] This case is ***extra***-ordinary because there is a "Yes" or "No" answer that **only** this Court can give. If this Court follows the "first-served" defendant rule, then the district court committed clear error as a matter of law, and this case should be remanded. But if this Court follows the "last-served" defendant rule, then the district court committed no error, and this case should stay in federal district court. ***Only* this Court can say which is right and which is wrong.** This is an ***extra***-ordinary case because refusing to take the writ of mandamus simply leaves the issue up in the air - a huge disservice to the lawyers and judges of the Ninth Circuit. Here, doing nothing is a positive harm.

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[10] ***Calderon v. U.S. Dist. Ct. for the N. Dist. of Cal.***, 134 F.3d 981, 984 (9th Cir. 1998).

[11] ***Burlington N. & Santa Fe Ry. Co. v. U.S. Dist Ct. for the Dist. of Cal.***, 408 F.3d 1142, 1146 (9th Cir. 2005).

B. The district court committed clear legal error.

The district court failed to follow the "first-served" defendant rule, which is: (1) the fairest rule; and (2) the apparent majority rule.[12] The analysis starts with the removal process: A defendant may remove a state civil case to federal court if there is diversity or federal question jurisdiction. ***28 U.S.C. § 1441(a) & (b).*** But the defendant must comply with ***28 U.S.C. § 1446(b),*** the first paragraph of which requires filing a notice of removal within 30 days after notice of the complaint. When there are multiple defendants, ***all defendants*** must join. The Supreme Court adopted this "unanimity rule" long ago.[13] All courts now follow it.[14]

Under the unanimity rule, any one defendant may prevent a case from being removed. If a defendant's removal notice fails to meet the timeliness or unanimity requirements of ***28 U.S.C. § 1446(b)***, the district court may remand the action upon a plaintiff's timely motion. ***28 U.S.C. § 1447(c).***

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[12] ***United Comp. Sys., Inc. v. AT& T Corp.***, 298 F.3d 756, 762 (9th Cir. 2002) (First-served rule apparently adopted by majority of courts.).

[13] ***See, e.g., Chicago, Rock Island & Pacific Railway Co. v. Martin***, 178 U.S. 245, 248 (1900).

[14] ***Prize Frize, Inc. v. Matrix (U.S.) Inc.***, 167 F.3d 1261, 1266 (9th Cir. 1999); ***Parrino v. FHP, Inc.***, 146 F.3d 699, 703 (9th Cir. 1998). Congress recently abrogated the "unanimity rule" for certain class action lawsuits. ***See Abrego Abrego v. The Dow Chemical Co.***, 443 F.3d 676 (9th Cir. 2006). But that change does not affect the present case, which is ***not*** a class action.

Courts strictly construe removal statutes against removal, resolving doubt in favor of remand.[15] "[S]trict construction is especially warranted in diversity cases, where concerns of comity mandate that state courts be allowed to decide state cases unless the removal action falls squarely within the bounds Congress has created."[16] Courts have adopted the "first-served" rule for three main reasons: (1) It inevitably flows from the unanimity rule; (2) forum selection should be resolved as early as possible; and (3) Removal statutes must be construed narrowly.

First, under the unanimity rule, all defendants must join a removal even , though they have not received a copy of the complaint.[17] In fact, failure to move for removal within the 30-day period is an irrevocable choice not to remove. "To hold otherwise would have the effect of extending the thirty-day limitation as applied to that defendant for an indefinite period."[18] Looked at from a different perspective, failure to

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[15] ***Gaus v. Miles, Inc.,*** 980 F.2d 564, 566 (9th Cir. 1992) ("We strictly construe the removal statute against removal jurisdiction. Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.") (citations omitted).

[16] ***Horn v. Service Merchandise Co., Inc.,*** 727 F. Supp. 1343, 1345 (N.D. Cal. 1990) (citation and internal quote marks omitted).

[17] ***See Chicago, Rock Island & Pacific Railway Co. v. Martin,*** 178 U.S. 245,248 (1900); ***Embury v. King,*** 361 F.3d 562, 563 n.1 ((9th Cir. 2004). The only exception to the unanimity rule may be for nominal, unknown, or fraudulently joined parties. ***United Comp. Sys., Inc. v. AT& T Corp.,*** 298 F.3d 756, 762-63 (9th Cir. 2002). That exception does not apply here.

[18] ***Trans. Indem. Co. v. Financial Trust Co.,*** 339 F. Supp. 405, 409 (C.D. Cal. 1972).

remove within thirty days operates as a waiver. Logically then, that defendant must be barred from consenting to a later-served defendant's removal notice, or there would be no unanimity.[19]

Second, courts applying the majority rule stress the need to settle forum selection as early as possible. Indeed, Congress specified that, if removal does not occur within one year after commencement of the action in state court, it cannot be removed ever.[20] This is an inherent repudiation of the last-served defendant rule, which would sanction removal even if a defendant were served over a year after commencement of the state-court action.

Third, the rule requiring narrow construction of removal statutes supports the majority rule.[21] Giving the first-served defendant another chance to agree to removal each time another defendant receives notice of the complaint creates a rolling deadline that will keep rolling as new defendants are named and served.

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[19] ***Cantrell v. Great Republic Ins. Co.***, 873 F.2d 1249, 1254 (9th Cir. 1989) (Failure to remove within 30 days results in a waiver of the right to remove.).

[20] ***28 U.S.C. § 1446(b). See also Bush v. Cheaptickets, Inc.***, 425 F.3d 683, 688-89 (9th Cir. 2005); ***Hill v. Blind Ind. & Serv. of Md.***, 179 F.3d 754, 757 (9th Cir. 1999).

[21] ***See, e.g., Brown v. Demco, Inc.***, 792 F.2d 478, 482 (5th Cir. 1986) ("[B]y restricting removal to instances in which the statute clearly permits it, the rule is consistent with the trend to limit removal and with the axiom that the removal statutes are to be construed against removal."); ***Duncan v. Stuetzle***, 76 F.3d 1480, 1485 (9th Cir. 1996).

C. Plaintiffs have no other means to attain the desired relief.

Plaintiffs have no appeal-of-right from an order denying a motion to remand. Judge Bolton encouraged the mandamus petition.[22] Indeed, because a direct appeal is blocked, a petition for writ of mandamus is the only avenue of relief.

D. Plaintiffs will be prejudiced in a way not correctable on appeal.

Plaintiffs started this case in state court because that is their right, because state court is demonstrably faster, and because state court judges inherently know more about issues of state law than does the federal court, which can only "predict" substantive state law. On appeal, there is no way to correct any prejudice caused by excessive delays in federal district court and by rulings on substantive matters that differ from the rulings that a state judge would give.

E. The district court's order is an often-repeated error of law.

One of these rules is right; one is wrong. Within our Circuit, many district courts follow the first-served defendant rule[23] and some district courts follow the last-served defendant

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[22] Exh. 3, ***Reporter's Transcript of Proceedings*** at 5-6 (emphasis added) (Feb. 27, 2006).

[23] ***See, e.g., McAnally Ent., Inc. v. McAnally***, 107 F. Supp. 2d 1223 (C.D. Cal. 2000); ***Biggs Corp. v. Wilen***, 97 F. Supp. 2d 1040 (D. Nev. 2000); ***Teitelbaum v. Soloski***, 843 F. Supp. 614 (C.D. Cal. 1994); ***Samura v. Kaiser Found. Health Plan, Inc.***, 715 F. Supp. 970, 971 (N.D. Cal. 1989); ***Pic-Mount Corp. v.***

rule.[24] This Circuit traditionally celebrates its diversity, but diametrically opposite results in district courts within our Circuit on this simple issue is not diversity, it is anarchy depriving one class of litigants of the benefits of the correct rule of law - whatever this Court declares that rule to be.

F. The district court's order raises issues of law of first impression.

What rule to follow is an issue of first impression in our Circuit. This is a chance to answer the question and provide guidance for all in the Ninth Circuit.

CONCLUSION

The district court's error is one that would have never happened if this Court had just adopted one removal rule or the other. This is an extraordinary situation that this Court should correct by accepting this petition for rehearing en banc and finally adopting a removal rule.

Stoffel Seals Corp., 708 F. Supp. 1113 (D. Nev. 1989); ***Trans. Indem. Co. v. Fin. Trust Co.***, 339 F. Supp. 405 (C.D. Cal. 1972); ***Morgan v. Asbestos Defs. (BHC)***, 2003 WL 945987 (N.D. Cal. Feb. 28, 2003); ***Ireland v. Checkerboard Square, LLC***, 2005 WL 43995 (Magistrate D. Or. Jan. 10, 2005), ***rpt. & rec. adopted by*** 2005 WL 372204 (D. Ore. Feb. 15, 2005); ***Innovacom, Inc. v. Haynes***, 1998 WL 164933 (N.D. Cal. March 17, 1998); ***Bewley v. Cigna Fin. Advisors***, 1997 WL 601426 (N.D. Cal. Sept. 23, 1997).

[24] ***Griffith v. Am. Home Prods.***, 85 F. Supp.2d 995, 999 (E.D. Wash. 2000); ***Ford v. New United Motors Mfg.***, 857 F. Supp. 707, 708-10 (N.D. Cal. 1994).

DATED this 1st day of August, 2006.

/s/ David L. Abney, Esq.
David L. Abney, Esq.
Attorneys for Plaintiffs-Petitioners

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-72379

[Filed May 2, 2006]

LAWRENCE HOBBS individually; LAWRENCE and GLORIA HOBBS, husband and wife; TYLER HOBBS, JENNIFER PORTILLO, and CHRISTINE HOBBS, children, *Petitioners*,	)
UNITED STATES DISTRICT COURT for the DISTRICT of ARIZONA, *Respondent*,	)
PACIFICORP, an Oregon corporation; PACIFICORP, L.L.C., a Delaware Corporation; S.D. MYERS, INC., a foreign corporation, *Real Parties in Interest.*	)

PETITION FOR WRIT OF MANDAMUS

A. Introduction: The nature of this writ of mandamus.

The question concerns the time limit for removing a case to federal court. When there are multiple defendants, there are two rules for determining when a notice of removal must be

filed. One is the "first-served" defendant rule; the other is the "last-served" defendant rule. Under the "first-served" rule, notice of removal of one Real Party in Interest (PacifiCorp) was untimely. Under the "last-served" rule, the notice of removal was timely, and could bar a remand to state court.

The United States District Court for the District of Arizona (Hon. Susan R. Bolton) refused to grant the motion to remand filed by Petitioners ("Plaintiffs"). Judge Bolton held that the "last-served" defendant rule applied. When Plaintiffs moved for certification of an interlocutory appeal, Judge Bolton declined, but later expressly encouraged Plaintiffs to pursue the matter through a writ of mandamus to the Ninth Circuit Court of Appeals.

Neither the Supreme Court nor the Ninth Circuit has ever decided what rule to follow. District courts within the Ninth Circuit - and circuit and district courts across the nation - are sharply split. This Court should accept the Petition because this issue has evaded appellate review in the Ninth Circuit for decades. Judges, lawyers and litigants within the Ninth Circuit need and deserve guidance on this important, elusive subject.

B. The factual and procedural history of the case.

The "Unit 4" fire and explosion

On May 8, 2004, Plaintiff Lawrence Hobbs was an Engineering/Installation Technician at Cholla Power Plant, an electric generating facility located in Joseph City, Navajo

County, Arizona,[1] and owned by Arizona Public Service Company. Hobbs was walking near a huge generator and transformer ("Unit 4") of the facility when there was a fire and explosion of the Unit 4 main transformer that knocked him down and inflicted severe second-degree and third-degree burns. Real Parties in Interest ("Defendants") owned, operated, and/or worked on Unit 4. Plaintiffs investigated and learned that Defendants' negligence had caused the accident.

Plaintiffs sue Defendants in Arizona state court

On May 5, 2005, Plaintiffs sued Defendants in Maricopa County Superior Court in Phoenix, Arizona. Plaintiffs served the summons and complaint on the two proper named Defendants as follows:

- Defendant S.D. Myers, Inc. was personally served on May 16, 2005.

- Defendant PacifiCorp was personally served on May 24, 2005.[2]

Notice of removal and motion to remand

On June 23, 2005, Defendant PacifiCorp filed a notice of removal to the United States District Court for the District of

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[1] Joseph City is a small town about 78 miles east of Flagstaff, Arizona, or about 845 miles southeast of San Francisco, California.

[2] Defendant PacifiCorp LLC was served on May 13, 2005, but it turned out that this unrelated entity was not involved in any of the events of this case, and thus was not a proper Defendant. Thus, at this point, there are only two proper named Defendants in this case.

Arizona. This was more than 30 days after Defendant S.D. Myers was served with the summons and complaint, but within 30 days after service was made on Defendant PacifiCorp. On July 15, 2005, Petitioners filed their "Motion for Remand to Superior Court."

The district court's January 17, 2006 Order

In an Order filed January 17, 2006, District Judge Susan R. Bolton denied the motion to remand. In her Order, Judge Bolton noted that there was a decided split of authority on what rule to follow when determining timeliness of a notice of removal from state to federal court, because the removal statute did not specifically address whether to follow the "first-served" or the "last-served" defendant rule. Judge Bolton also correctly stated:

> Neither the Supreme Court of the United States nor the Ninth Circuit have ever addressed this issue. Within the Ninth Circuit, the District Courts are split regarding whether to apply the first-served defendant rule or the last-served defendant rule.[3]

Judge Bolton explained: "The first-served defendant rule, which has been followed by the Fifth Circuit and a large number of district courts, states that the thirty-day removal deadline begins to run for all defendants as soon as any defendant is served with process. If the first-served defendant fails to remove the case within the thirty-day period, the right

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[3] Exh. 1, ***Jan. 17, 2006 Order*** at 3, lines 3-5.

to removal will have been waived and the defendant will be foreclosed from joining any future removal attempts."[4]

On the "last-served" defendant rule, Judge Bolton observed that: "The later-served defendant rule, which has been adopted by the Sixth and the Eight Circuits and many district courts, states that each defendant has thirty days from the time of service to convince all earlier-served defendants to join a petition for removal."[5]

Judge Bolton concluded that she should follow the "last-served" defendant rule, and denied Plaintiffs' motion to remand.

The motion for certification of the interlocutory appeal

Plaintiffs filed a "Motion for Certification of Interlocutory Appeal" with the district court on January 20, 2006. In her February 24, 2006 Order, Judge Bolton agreed that: "Circuits and district courts are deeply divided, and the Ninth Circuit (as well as several other circuits) have not yet provided an answer to this frequently recurring issue. Part of the reason for the courts' silence could be the issue's elusive nature on appeal. Parties (or appellate courts) appear unwilling to resolve the issue on interlocutory appeal, and it is seldom pursued following final judgment."[6] But Judge Bolton held

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[4] Exh. 1, ***Jan. 17, 2006 Order*** at 3, lines 12-14, 17-19 (citations omitted).

[5] Exh. 1, ***Jan. 17, 2006 Order at 3***, lines 12-14, 17-19 (citations omitted).

[6] Exh. 2, ***Feb. 24, 2006 Order*** at 2, lines 24-25; 3, lines 1-3 (citations omitted).

that she could not certify the matter for an interlocutory appeal, because she concluded that the case's resolution would not be materially affected by being in federal court as opposed to state court.

Still, at a February 27, 2006 hearing, Judge Bolton strongly encouraged Plaintiffs to pursue this matter with the Ninth Circuit:

> **I would love it if the Ninth Circuit would address the issue so that we would know, once and for all**... I would love it if they would. It didn't seem to be one of the standards upon which I was supposed to certify an interlocutory appeal.
>
> So we didn't, but **if you want to pursue it, I would certainly encourage you to do so**, because the Ninth Circuit, I think, can apply whatever standard they think is appropriate even it it's a little different from the one we're required to follow.
>
> But I don't see any reason, while you're discussing all of that and determining whether you want to do that, to hold up the proceedings with this case, because even if the Ninth Circuit takes a look at it, what is done between now and when they may decide whether to take to case or not will be useful whether you're litigating here or back in state court.[7]

Because of an avalanche of work on other matters, Plaintiffs' counsel is only just now able to file this Petition.

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[7] Exh. 3, ***Reporter's Transcript of Proceedings*** at 5-6 (emphasis added)(Feb. 27, 2006).

Discovery is underway, but the district court has not been asked to make any substantive rulings, so the issue of where this case should be litigated - whether in state or federal court - has not been precluded or affected by any substantive rulings by the district court. The issue is a key legal and procedural matter that is ripe for decision.

C. The standard of review.

The writ of mandamus is an extraordinary remedy.[8] The Ninth Circuit has a five-factor test that it uses to evaluate the propriety of a writ of mandamus **under *28 U.S.C. §1651:***

(1) Petitioner has no other adequate means, such as a direct appeal, to attain the desired relief.

(2) Petitioner will be damaged or prejudiced in a way not correctable on appeal.

(3) The district court's order is clearly erroneous as a matter of law.

(4) The district court's order is an often-repeated error, or manifests a persistent disregard of the federal rules.

(5) The district court's order raises new and important problems, or issues of law of first impression.[9]

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[8] ***Kerr v. United States District Court for the Northern District of California,*** 426 U.S. 394, 402 (1976).

[9] ***Bauman v. United States District Court for the Northern District of California,*** 557 F.2d 650, 654-55 (9th Cir. 1977).

Of the five factors, "it is clear that the third factor, the existence of clear error as a matter of law, is dispositive."[10]

THE ISSUE

In removal cases, does the Ninth Circuit Court of Appeals follow the "first-served" defendant rule or the "last-served" defendant rule?

LEGAL ARGUMENT

A. This Court should accept the writ of mandamus because it presents an extra-ordinary case where circuit-wide guidance is needed.

"Existence of a clear error as a matter of law" is ***the*** dispositive factor for evaluating a petition for writ of mandamus.[11] This case is ***extra***-ordinary because there is a "Yes" or "No" answer that ***only*** this Court can give. In removal cases, does the Ninth Circuit Court of Appeals follow the "first-served" defendant rule or the "last-served" defendant rule?

If the Ninth Circuit follows the "first-served" defendant rule, then the district court committed clear error as a matter

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[10] ***Calderon v. United States District Court for the Northern District of California***, 134 F.3d 981, 984 (9th Cir. 1998) (quoting ***Executive Software North America, Inc. v. United States District Court for the Central District of California***, 24 F.3d 1545, 1551 (9th Cir. 1994)).

[11] ***Burlington Northern & Santa Fe Railway Co. v. United States District Court for the District of Montana***, 408 F.3d 1142, 1146 (9th Cir. 2005).

of law, and this case should be remanded to Maricopa County Superior Court, State of Arizona. On the other hand, if the Ninth Circuit follows the "last-served" defendant rule, then the district court committed no error of law, and this case should stay in federal district court.

***Only* the Ninth Circuit can say which is right and which is wrong.**

This is also an ***extra***-ordinary case because refusing to take the writ of mandamus would simply leave the issue up in the air - which would be a huge disservice to the lawyers and judges working in the Ninth Circuit. That is, if the Ninth Circuit believes that the "last-served" defendant rule is correct, and declines to publish an opinion adopting that position, then the uncertainty on this elusive, important legal problem will simply continue. Thus, this is a rare situation when doing nothing would not only be unhelpful for the Plaintiffs - it would also be unhelpful for the entire Ninth Circuit.

Plaintiffs believe that the "first-served" defendant rule matches the removal statute and process most closely and should be recognized as the correct rule in the Ninth Circuit. But right or wrong, the issue is one that has eluded a definitive answer in the Ninth Circuit for decades. Plaintiffs thus respectfully ask that the Court clarify this matter for the entire Ninth Circuit, even if that clarification goes against their effort to have this case returned to Arizona state court.

B. This Court should accept the writ of mandamus because the district court committed clear legal error.

The district court in this case failed to follow the "first-served" defendant rule, which is the fairest rule, the apparent

majority rule,[12] and the one that this Court should therefore recognize as the proper rule for the Ninth Circuit.

We start the analysis with the removal process. A defendant may remove a state civil case to federal court if there is diversity or federal question jurisdiction. ***28 U.S.C. § 1441(a) & (b)***. But the defendant must comply with the removal rules found in ***28 U.S.C. § 1446(b)***, the first paragraph of which requires a defendant to file a notice of removal within thirty 30 days after receiving notice of a complaint revealing diversity or a substantial federal question. And when there are multiple defendants, ***all defendants*** must join in the removal petition. The Supreme Court adopted this "unanimity rule" over a century ago.[13] Now, all federal courts follow the unanimity rule in regular removal cases.[14]

Under the unanimity rule, any one defendant may prevent a case from being removed. Ifa defendant's removal notice fails to meet the timeliness or unanimity requirements of ***28 U.S. C § 1446(b)***, the district court may remand the action

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[12] ***United Computer Systems, Inc. v. AT & T Corp.***, 298 F.3d 756, 762 (9th Cir. 2002) (The "first-served" defendant rule "has been apparently adopted by the majority of courts that have addressed this issue.").

[13] ***See, e.g., Chicago, Rock Island & Pacific Railway Co. v. Martin***, 178 U.S. 245, 248 (1900).

[14] ***See, e.g.,Prize Frize, Inc. v. Matrix (U.S.) Inc.***, 167 F.3d 1261, 1266 (9th Cir. 1999); ***Parrino v. FHP, Inc.***, 146 F.3d 699, 703 (9th Cir. 1998). Congress recently abrogated the "unanimity rule" for certain class action lawsuits. ***See Abrego Abrego v. The Dow Chemical Co.***, 2006 WL 864300 (9th Cir. April 4, 2006). But that change does not affect he present case, which is ***not*** a class action.

upon a plaintiff's timely motion.[15] Courts strictly construe removal statutes against removal jurisdiction. Any doubt is resolved in favor of remanding the case.[16] Indeed, "strict construction is especially warranted in diversity cases, where concerns of comity mandate that state courts be allowed to decide state cases unless the removal action falls squarely within the bounds Congress has created."[17]

As noted, the majority of courts have held that the thirty-day removal period begins to run for all defendants on the date the first defendant receives the initial complaint. Courts adopting the majority "first-served" rule have relied mainly on three reasons:

- It inevitably flows from the unanimity rule;
- Forum selection should be resolved as early as possible; and
- Removal statutes must be construed narrowly.

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[15] ***See 28 U.S.C. § 1447(c)*** ("A motion to remand the case on any basis other than subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a).").

[16] ***Gaus v. Miles, Inc.***, 980 F.2d 564, 566 (9th Cir.1992) ("We strictly construe the removal statute against removal jurisdiction. Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance.) (citations omitted).

[17] ***Horn v. Service Merchandise Co., Inc.***, 727 F. Supp. 1343, 1345 (N.D. Cal. 1990) (citation and internal quote marks omitted).

First, under the unanimity rule, all defendants must join a removal petition even though they have not received a copy of the complaint.[18] In fact, the failure of a defendant to move for removal within the 30-day period is regarded as an irrevocable choice not to remove. "To hold otherwise would have the effect of extending the thirty-day limitation as applied to that defendant for an indefinite period."[19] Looked at from a different perspective, a defendant's failure to remove a case within thirty days operates as a waiver of the fight to remove. Logically then, that defendant must be barred from consenting to a later-served defendant's removal notice, or there would be no unanimity.[20]

Second, courts applying the majority rule have emphasized the necessity that the forum selection should be settled as early as possible. Indeed, Congress has specified that, if removal does not occur within one year after commencement of the action in state court, it cannot be

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[18] ***See Chicago, Rock Island & Pacific Railway Co. v. Martin,*** 178 U.S. 245, 248 (1900); ***Embury v. King,*** 361 F.3d 562, 563 n.1 ((9th Cir. 2004) (consent of all defendants required for removal). The only exceptions to the unanimity rule may be for parties who are nominal, unknown, or fraudulently joined. ***United Computer Systems, Inc. v. AT& T Corp.,*** 298 F.3d 756, 762-63 (9th Cir. 2002). That exception does not apply here.

[19] ***Transport Indemnity Co. v. Financial Trust Co.,*** 339 F. Supp. 405, 409 (C.D. Cal. 1972).

[20] ***Cantrell v. Great Republic Ins. Co.,*** 873 F.2d 1249, 1254 (9th Cir. 1989) (Failure to remove within 30 days results in a waiver of the fight to remove.).

removed ever.[21] One could view this as an inherent repudiation of the logic of the last-served defendant rule, which would sanction removal even if a defendant was served over a year after commencement of the state-court action.

Third, the rule requiring narrow construction of removal statutes supports the majority rule.[22] Giving the first-served defendant another chance to agree to removal each time another defendant receives notice of the complaint creates a rolling deadline that can repeatedly reopen, even when a new defendant is added weeks or months after initial service on the first-served defendant.

C. This Court should accept the writ of mandamus because Plaintiffs have no other means, such as direct appeal, to attain the desired relief.

Plaintiffs have no appeal-of-right from an order denying a motion to remand. Judge Bolton declined to certify the case for an interlocutory appeal, although, as noted above, she stated that: **"I would love it if the Ninth Circuit would address the issue so that we would know, once and for all**

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[21] ***28 U.S.C. §1446(b). See also Bush v. Cheaptickets, Inc.***, 425 F.3d 683, 688-89 (9th 2005) (discussing the one-year removal limit); ***Hill v. Blind Industries and Services of Maryland,*** 179 F.3d 754, 757 (9th Cir. 1999) ("Removal and remand are... governed by strict time limits.").

[22] ***See, e.g., Brown v. Demco, Inc.***, 792 F.2d 478 482 (5th Cir. 1986) ("[B]y restricting removal to instances in which the statute clearly permits it, the rule is consistent with the trend to limit removal and with the axiom that the removal statutes are to be construed against removal."); ***Duncan v. Stuetzle,*** 76 F.3d 1480, 1485 (9th Cir. 1996).

. . . . I would love it if they would. . . . [B]ut **if you want to pursue it, I would certainly encourage you to do so.**"[23] Because a direct appeal is blocked and an interlocutory appeal is not available, a petition for writ of mandamus is the only way for the Plaintiffs to obtain relief from the district court's order denying their motion to remand.

D. This Court should accept the writ of mandamus because Plaintiffs will be damaged or prejudiced in a way not correctable on appeal.

Plaintiffs started this case in Arizona state court because that is their right, because state court is demonstrably faster and less-crowded, and because state court judges inherently know more about issues of state law than does the federal court, which can only "predict" what substantive state law will be. On appeal, there is no way to correct any damage or prejudice caused by excessive delays in federal district court and by rulings on substantive matters that differ from the rulings that a state judge would provide. No appeal can repair these things.

E. This Court should accept the writ of mandamus because the district court's order is an often-repeated error of law.

One of these rules is right; one of them is wrong. Within the Ninth Circuit, many district courts follow the first-served defendant rule[24] and some district courts follow the last-

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[23] Exh. 3, ***Reporter's Transcript of Proceedings*** at 5-6 (emphasis added) (Feb. 27, 2006).

[24] ***See, e.g., McAnally Enterprises, Inc. v. McAnally***, 107 F. Supp. 2d 1223 (C.D. Cal. 2000); ***Biggs Corp. v. Wilen***, 97 F.

served defendant rule.[25] The Ninth Circuit has traditionally celebrated its diversity, but diametrically opposite results in district courts within the Ninth Circuit on this simple issue is not diversity, it is anarchy depriving one class of litigants of the benefits of the correct rule of law - whatever the Ninth Circuit declares that rule to be.

F. This Court should accept the writ of mandamus because the district court's order raises issues of law of first impression - as far as the Ninth Circuit's resolution is concerned.

First-served defendant? Last-served defendant? What rule to follow is an issue of first impression in the Ninth Circuit. This is a fair opportunity to answer the question and provide guidance for all judges and lawyers in the Ninth Circuit.

Supp. 2d 1040 (D. Nev. 2000); ***Teitelbaum v. Soloski***, 843 F. Supp. 614 (C.D. Cal. 1994); ***Samura v. Kaiser Foundation Health Plan, Inc.***, 715 F. Supp. 970, 971 (N.D. Cal. 1989); ***Pic-Mount Corp. v. Stoffel Seals Corp.***, 708 F. Supp. 1113 (D. Nev. 1989); ***Transport Indemnity Co. v. Financial Trust Co.***, 339 F. Supp. 405 (C.D. Cal. 1972); ***Morgan v. Asbestos Defendants (BHC)***, 2003 WL 945987 (N.D. Cal. Feb. 28, *2003);**Ireland v. Checkerboard Square, LLC*,** 2005 WL 43995 (Magistrate D. Or. Jan. 10, 2005), ***report and recommendation adopted by*** 2005 WL 372204 (D. Ore. Feb. 15, 2005); ***Innovacom, Inc. v. Haynes***, 1998 WL 164933 (N.D. Cal. March 17, 1998); ***Bewley v. Cigna Financial Advisors***, 1997 WL 601426 (N.D. Cal. Sept. 23, 1997).

[25] ***See, e.g., Griffith v. Am. Home Prods.***, 85 F. Supp.2d 995, 999 (E.D. Wash. 2000); ***Ford v. New United Motors Mfg.***, 857 F. Supp. 707, 708-10 (N.D. Cal. 1994).

CONCLUSION

The United States District Court of the District of Arizona followed the "last-served" defendant rule and declined to remand a case to Arizona state court. If that decision was wrong, this Court should issue a writ of mandamus correcting the error of law, and explaining that the "first-served" defendant rule will be followed. On the other hand, if that decision was right, this Court should at least accept jurisdiction of this matter, and issue an opinion explaining which that the "last-served" defendant rule will be followed. Without published guidance, the district courts in the Ninth Circuit will continue to flounder. That situation helps no one, but can be easily corrected - by this Court.

DATED this 2nd day of May, 2006.

CHARLES M. BREWER, LTD.

/s/ David L. Abney
Charles M. Brewer
John D. Brewer
Dane L. Wood
David L. Abney
Attorneys for Petitioners

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV05-1906-PHX-SRB

[Filed January 27, 2006]

LAWRENCE HOBBS, individually; LAWRENCE and GLORIA HOBBS, husband and wife; TYLER HOBBS, JENNIFER HOBBS, and CHRISTINE HOBBS, children, Plaintiffs,	)
v.	)
PACIFICORP, an Oregon Corporation; PACIFICORP, L.L.C., a Delaware Corporation; S.D. MYERS, INC., a foreign corporation; et al., Defendants.	)

Phoenix, Arizona
February 27, 2006
11:15 a.m.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SUSAN R. BOLTON
UNITED STATES DISTRICT JUDGE

(RULE 16 SCHEDULING CONFERENCE)

[pg. 5]

interlocutory appeal.

MR. WOOD: Yes, Your Honor.

THE COURT: Are you going to pursue it with the Ninth Circuit, in any event?

MR. WOOD: I was out of the office Friday. We had a matter down in southern Arizona, and so the first opportunity I had was this morning to read through it. We are going to discuss it internally.

At this point, I don't know. I suspect that it's something we're going to look very seriously at and see if it's -- because as Your Honor had mentioned in the order, it is kind of an illusive sort of issue in terms of, well, if we do proceed to trial, then what object is served in terms of appealing it at that time? And that would be our only rationale for doing so.

THE COURT: Well, I was looking for that in the standards and didn't find it. And that -- I would love it if the Ninth Circuit would address the issue so that we would know, once and for all, but the -- I would love it if they would. It didn't seem to be one of the standards upon which I was supposed to certify an interlocutory appeal.

So we didn't, but if you want to pursue it, I would certainly encourage you to do so, because the Ninth Circuit, I think, can apply whatever standard they think is appropriate even if it's a little different from the one

[pg. 6]

that we're required to follow.

But I don't see any reason, while you're discussing all of that and determining whether you want to do that, to hold up the proceeding with this case, because even if the Ninth Circuit takes a look at it, what is done between now and when they may decide whether to take the case or not will be useful whether you're litigating here or back in state court.

MR. WOOD: Yes, I agree, Your Honor. And I think we'll probably make the decision here within the next ten days.

THE COURT: So let's take a look at the Rule 16 scheduling order. And you can fill this in with me. Obviously, with the electronic file, as soon as this document is signed and filed electronically, you'll also receive a copy of it electronically.

And I'm starting on page 11 of your plan where you address the first item here, which is the time for the exchanging of initial disclosures. The parties have both agreed that that date will be March 13, 2006.

My next item, paragraph D, Mr. Wood, do you wish to have a deadline for any amendments to the complaint? And if so, by what date would you like to make a decision whether you need to amend?

MR. WOOD: We hadn't given any thought to that.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-05-1906-PHX-SRB

[Filed January 20, 2006]

LAWRENCE HOBBS individually; LAWRENCE and GLORIA HOBBS, husband and wife; TYLER HOBBS, JENNIFER PORTILLO, and CHRISTINE HOBBS, children, Plaintiffs,	)
v.	)
PACIFICORP, an Oregon corporation; PACIFICORP, L.L.C., a Delaware Corporation; S.D. MYERS, INC., a foreign corporation, Defendants.	)

MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

Pursuant to *28 U.S.C. § 1292 (b)*, Plaintiffs hereby respectfully move the Court to certify - for an interlocutory appeal - the January 17, 2006 Order declining to remand this

case to state court. The reasons for this request appear in the attached Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

A. The Court should certify this important issue for interlocutory appeal.

Denial of a remand motion is ordinarily not immediately appealable. This case, however, offers a unique chance to clarify a controlling issue of law on which there has been a substantial ground for difference of opinion, and that has unfortunately eluded the Ninth Circuit's resolution. In fact, as this Court observed on Page 3 of its January 17, 2006 Order, this is also an issue that has divided the district courts within the Ninth Circuit and that has never before been considered in the District of Arizona. Pages 3 and 6 of the January 17, 2006 Order also accurately highlighted the conflict between the Fifth Circuit and the many district courts that follow the first-served defendant rule - on the one hand - and the Sixth and Eighth Circuits and the many district courts that follow the later-served defendant rule- on the other hand. It is a murky procedural muddle.

This Court's comprehensive, well-researched, and well-written January 17, 2006 Order which is ***already*** available internationally on the Westlaw computer research system[1] – addressed a complex and contentious legal problem that the Ninth Circuit can and should resolve for all of the district courts within its vast coverage. While Plaintiffs disagree with the January 17, 2006 Order, Plaintiffs concede that the Court

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[1] *See* ***Hobbs v. Pacificorp***, Slip Copy, 2006 WL 120325 (D. Ariz. Jan. 17, 2006).

has judiciously and capably framed the issue and the conflict for easy and prompt analysis and resolution by the Ninth Circuit.

Even if an order is normally not appealable, *28 U.S.C. § 28-1292(b)* allows a district judge to Certify that such an order ***is appealable*** when the district judge is "**of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.**" Then, if the Ninth Circuit agrees it may, "in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order." *28 U.S.C. § 28-1292(b).*

There will be no prejudice to the defendants by asking the Ninth Circuit to consider taking this matter as an interlocutory appeal. If the Ninth Circuit is not interested, it will promptly act to deny any consideration of an interlocutory appeal. On the other hand, if the Ninth Circuit is interested in this matter, and chooses address this important issue, then defendants, plaintiffs - and all other litigants across the Ninth Circuit - will have the benefit of guidance from the Ninth Circuit on an important issue of law and legal procedure.

B. Conclusion.

This Court's clear, concise January 17, 2006 Order can and should be the starting point for a circuit-wide clarification of removal jurisprudence that will end the conflict among the district courts in our circuit. Plaintiffs therefore respectfully request that the Court enter an Order certifying its opinion that the January 17, 2006 Order involves a controlling question of law on removal jurisprudence as to which there is

substantial ground for difference and that an immediate appeal from the January 17, 2006 Order may materially advance the ultimate termination of the litigation. The Ninth Circuit can then decide whether or not to accept the discretionary interlocutory appeal.

DATED this 20th day of January, 2006.

CHARLES M. BREWER, LTD.

By /s/ Dane Wood
Dane L. Wood
5500 North 24th Street
Phoenix, Arizona 85016
Attorney for Plaintiffs

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CV 2005-1906-PHX-SRB

[Filed January 27, 2006]

LAWRENCE HOBBS, et al.,	)
Plaintiffs	)
	)
vs.	)
	)
PACIFICORP, et al.,	)
Defendants	)
	)

DEFENDANT PACIFICORP'S RESPONSE IN OPPOSITION TO MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

Summary of Argument

Correctly understood, the Motion for Certification would have this Court certify for immediate appeal a "comprehensive, well-researched, and well-written" order merely because the plaintiffs disagree with it. [Motion at p.2] Leaving aside that disagreement with a court's ruling is insufficient to justify an interlocutory appeal [*United States Rubber Co. v. Wright,* 359 F.2d 784, 785 (9th Cir. 1966)], the

Motion should be denied for at least any of the following reasons:

1. The Motion ignores the requirement that an interlocutory appeal should be allowed "only in extraordinary cases." *United States Rubber,* 359 F.2d at 785.

2. The Motion fails to identify a "controlling issue of law" that will speed the termination of this litigation. *See Mateo v. M/S Kiso,* 805 F. Supp. 792, 800 (N.D. Cal. 1992).

3. The Motion, at least implicitly, concedes that what was once characterized as "the dispositive case" [Plaintiff's Reply in Support of Motion to Remand at p. 1 (citing *Schwartz v. FHP Corp.*, 947 F. Supp. 1354 (D. Ariz. 1996)] has no applicability here, at all. And, the Motion fails to give any explanation for disputing the Court's conclusion that the ruling here is compelled by, among other reasons, a regard for what is fair given the facts of this case.

Reasons to Deny the Motion

It is settled-law in this Circuit that interlocutory appeals are to be permitted only in extraordinary cases. *United States Rubbel,* 359 F.2d at 785; *see also United States v. Woodbury,* 263 F.2d 784, 788 n.11 (9th Cir. 1959) (stating that section 1292(b) "is to be applied sparingly and only in exceptional circumstances"). Other courts have agreed with the Ninth Circuit's conclusion that 28 U.S.C. § 1292(b) is not to be used in ordinary cases. *See Loritz v. CMT Blues,* 271 F. Supp.2d 1252, 1254 (S.D. Cal. 2003) (citations omitted). Notwithstanding plaintiff's burden to demonstrate that this is an extraordinary or exceptional case [*see Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474-75 (1978)]; the Motion not only fails to meet that burden, it never tries. Other than a

speculative suggestion that, possibly, the Ninth Circuit may be interested in looking at the issue of removal and the first-served defendant rule at this time, a possibility that by no reasonable standard turns this into an exceptional case, there is no discussion anywhere in the Motion that meets or even attempts to meet plaintiff's burden. Nor could there be: this is a personal injury case, and "an ordinary personal injury action which can be promptly determined by Court and jury" fails to meet the section 1292(b) standard as an extraordinary case. *Dalla v. Atlas Maritime Co.*, 562 F. Supp. 752, 759 (C.D. Cal. 1983), *aff'd*, 771 F.2d 1377 (9th Cir. 1985); *see also United States Rubber*, 359 F.2d 784 (concluding that an "uncertain question of law" in "unexceptional contract litigation" fails to meet extraordinary case standard).

Beyond that, an interlocutory appeal is inappropriate absent a controlling issue of law, the determination of which will speed the termination of the litigation. *Mateo*, 805 F. Supp. at 800. The Motion does not and cannot make that showing. That is because, even if one assumes that the Ninth Circuit were to disagree with this Court's interpretation of the removal statute and analysis of the first-served versus last-served defendant rule, this matter would return to state court. This litigation would *not* terminate. There is reason to believe that, irrespective of how the Ninth Circuit may reach its conclusion, the result would be the same, i.e., the denial of the remand motion would be affirmed because, as explained in PacifiCorp's response to the remand motion, even when applying the first-served defendant rule to the facts here, remand is not warranted. But irrespective of how the Ninth Circuit may rule, it cannot be disputed that the litigation would *not* end. And when, as here, the requested interlocutory appeal pertains to a ruling that merely determines whether the litigation will proceed in federal or state court, it is not a ruling involving an issue that, as

required by section 1292(b), can be deemed to "materially advance the ultimate termination of the litigation." *See Spagnuolo v. Port Authority of New York and New Jersey*, 245 F. Supp.2d 521,523 (S.D.N.Y. 2002).

Finally, the Court correctly concluded that, if plaintiffs' interpretation of the removal statute (28 U.S.C. §1332) were correct, it then follows that Congress established a procedure granting all defendants a right to remove while at the same time allowing plaintiffs a unilateral opportunity to deny certain defendants that right. Just how such a result equates with notions of fairness, especially here where removal was accomplished at the very outset of the litigation and not months or even years later, is something else that the Motion does not and cannot explain.

Relief Requested

The Motion for Certification of Interlocutory Appeal should be denied. January 27, 2006.

JENNINGS, STROUSS & SALMON, P.L.C.

By s/ Michael J. O'Connor

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Attorneys for Defendant PacifiCorp

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-05-1906-PHX-SRB

[Filed February 6, 2006]

LAWRENCE HOBBS individually; LAWRENCE and GLORIA HOBBS, husband and wife; TYLER HOBBS, JENNIFER PORTILLO, and CHRISTINE HOBBS, children, Plaintiffs,	)
v.	)
PACIFICORP, an Oregon corporation; PACIFICORP, L.L.C., a Delaware Corporation; S.D. MYERS, INC., a foreign corporation, Defendants.	)

REPLY IN SUPPORT OF MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

MEMORANDUM OF POINTS AND AUTHORITIES

A. This "extraordinary" case deserves certification to the Ninth Circuit.

This is an extraordinary - and opportune - case for an interlocutory appeal. District courts within the Ninth Circuit are sharply divided over what date-of-service rule to use in removal cases. Some use the "first-served defendant" rule while others use the "last-served defendant" rule. There is no guidance from the Ninth Circuit; the United States Supreme Court is silent on the issue; even the federal circuit courts have reached no consensus. The reason for this lack of guidance is not just the inevitable difference of opinion that often plagues the law. Instead, it is probably the fact that, while such cases often arise, they stubbornly evade appellate review.

For litigants, it is probably too much bother to seek an interlocutory appeal based on which date-of-service rule should apply, despite the fact that remand is important to the conduct and final outcome of such cases. After all, as this Court knows from its extensive and distinguished experience in the state and federal courts, there are practical, marked differences in the ways that cases are litigated in the state and federal courts, on such important matters as discovery methods and limits, time to resolve the case, costs to the and judicial resources.

What makes this case so "extraordinary" is the golden opportunity to present this issue to the Ninth Circuit. If the judges of the Ninth Circuit want to select a removal rule to follow - as logic would require - then they can grant an interlocutory appeal and provide critically needed help and guidance to the district courts. If not, then the judges of the Ninth Circuit can let us know that in very short order, and that will be the end of the matter. Here, as in so many other

legal matters, it does not hurt to ask, and may indeed immensely advance the removal jurisprudence of the Ninth Circuit.

In point of fact, the Ninth Circuit appears to routinely find "extraordinary" circumstances in cases concerning the allegedly improper denial of motions to remand. It has allowed interlocutory appeals in a number of such cases.[1] There is every reason to think that it would also do so in the present case as well, where the circumstances are uniquely compelling.

B. The choice of what removal rule to adopt is the "controlling issue of law".

The "controlling issue of law" that Plaintiffs ask the Ninth Circuit to accept for an interlocutory appeal is what rule to adopt: the "first-served defendant" rule or the "last-served defendant" rule. After the many decades that the removal process has been in existence, the Ninth Circuit has never had an opportunity to choose between these antithetical rules,

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[1] *See, e.g., Sheeran v. General Electric Co.*, 593 F.2d 93, 97 (9th Cir. 1979), *cert. denied*, 444 U.S. 868 (1979); *Lee v. American National Insurance* Co., 260 F.3d 997, 1000 (9th Cir. 2001), *cert. denied*, 535 U.S. 928 (2002); *Sullivan v. First Affiliated Sec., Inc.*, 813 F.2d 1368, 1371 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987); *ARCO Environmental Remediation, L.L.G v. Department of Health and Environmental Quality of Montana*, 213 F.3d 1108, 1111, 1117-18 (9th Cir. 2000). Other circuit courts similarly often allow interlocutory appeals from orders denying motions to remand. *See, e.g., City of Clarksdale v. BellSouth Telecommunications, Inc.*, 428 F.3d 206, 208-10 (5th Cir. 2005); *Watson v. Philip Morris Companies, Inc.*, 420 F.3d 852, 854 (8th Cir. 2005).

apparently because no litigant was sufficiently interested to ask for certification. Plaintiffs are, however, interested and are willing to ask this Court to certify this matter for Ninth Circuit consideration as an interlocutory appeal. This is a divisive, contentious subject that should have been settled long ago in the Ninth Circuit. While Plaintiffs disagree with the January 17, 2006 Order, they admit that it could be hard to find a more adept analysis of the law. The January 17, 2006 Order is the perfect springboard for an interlocutory appeal, as long as the Ninth Circuit is willing to accept the interlocutory appeal.

Determination of this controlling issue of law could drastically speed the termination of this litigation. After all, if the Ninth Circuit accepts the interlocutory appeal and adopts the "last-served defendant" rule, this case will vanish from the district court docket. That is as speedy a termination as any district court could want.

Indeed, the Ninth Circuit has specifically held that: "Where a motion to remand is denied, the propriety of removal is reviewable on appeal from the final judgment ***or by interlocutory appeal*** if the refusal to remand is certified under 28 U.S.C. § 1292(b)."[2] In fact, in interlocutory appellate proceedings, the Ninth Circuit will "review de novo the district court's order denying [a plaintiff's] motion to remand."[3]

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[2] ***Sheeran v. General Electric Co.***, 593 F.2d 93, 97 (9th Cir. 1979) (emphasis added), ***cert. denied,*** 444 U.S. 868 (1979).

[3] ***Lee v. American National Insurance Co.***, 260 F.3d 997, 1000 (9th Cir. 2001), ***cert. denied,*** 535 U.S. 928 (2002).

When it grants an interlocutory appeal concerning denial of a motion to remand, the Ninth Circuit holds that the "burden of establishing jurisdiction falls on the party invoking the removal statute, which is strictly construed against removal."[4] And when the Ninth Circuit determines in an interlocutory appeal that failure to remand is improper, it will reverse the district court, thus terminating the case in the federal system,[5] and necessarily easing the district court's docket, which is an important consideration for any district court.

The *Spagnuolo*[6] district court case from New York is not authority for the proposition that grant or denial of a remand to state court would not materially advance the ultimate termination of the litigation. The district judge in *Spagnuolo* specifically held that the federal interests in the case would be adequately protected in state court once the case was remanded.[7] In point of fact, of course, since the action in *Spagnuolo* was remanded to state court, it ended in federal court, so there was no concern about the case continuing in federal court in any event. ***Even more important,*** the discussion in *Spagnuolo* on the factors needed for an interlocutory appeal is pure dictum, since, by statute, orders

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[4] ***Sullivan v. First Affiliated Sec., Inc.***, 813 F.2d 1368, 1371 (9th Cir. 1987), ***cert. denied***, 484 U.S. 850 (1987) (citations omitted).

[5] ***ARCO Environmental Remediation, L.L.C. v. Department of Health and Environmental Quality of Montana***, 213 F.3d 1108, 1111, 1117-18 (9th Cir. 2000).

[6] ***Spagnuolo v. PortAuthority of N.Y. & N.J.***, 245 F. Supp. 2d 521 (S.D.N.Y. 2002).

[7] ***Spagnuolo***, 245 F. Supp. 2d at 523.

remanding a case to state court are *not.* appealable, unless the case is a civil rights case.[8]

C. Conclusion.

This case is an excellent candidate for certification to the Ninth Circuit. If the Ninth Circuit consents to take the interlocutory appeal, it can establish what service rule will apply in district courts within the Ninth Circuit. This Court's January 17, 2006 Order is a timely and extraordinary opportunity. Plaintiffs thus respectfully move the Court to re-issue the January 17, 2006 Order - to prevent any timeliness issues - and to certify that re-issued Order for consideration by the Ninth Circuit as an interlocutory appeal. Plaintiffs would welcome the opportunity to discuss this matter at oral argument with the Court, at its convenience.

DATED this 6th day of February, 2006.

CHARLES M. BREWER, LTD.

By /s/ Dane Wood
Dane L. Wood
5500 North 24th Street
Phoenix, Arizona 85016
Attorney for Plaintiffs

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[8] ***See 28 U.S.C. § 1447(d)*** ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to [28 U.S.C. § 1443 - civil rights cases] shall be reviewable by appeal or otherwise.").

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV'05 1906 PHX SRB

[FILED June 23, 2005]

LAWRENCE HOBBS individually; LAWRENCE and GLORIA HOBBS, husband and wife; TYLER HOBBS, JENNIFER PORTILLO, and CHRISTINE HOBBS, children, Plaintiffs,	)
vs.	)
PACIFICORP, an Oregon corporation; PACIFICORP, L.L.C., a Delaware Corporation; S.D. MYERS, INC., a JOHN DOES and JANE DOES I-X; ABC PARTNERSHIPS I-X, inclusive; and BLACK CORPORATIONS I-X, inclusive, Defendants.	)

Pursuant to 28 U.S.C. §§ 1332, 1441, and 1446, defendants PacifiCorp and PacifiCorp, L.L.C. remove this action, which is pending in the Arizona Superior Court (Maricopa County).

1. PacifiCorp, PacifiCorp, L.L.C., and S.D. Myers, Inc. are defendants in a civil action in the Arizona Superior Court (Maricopa County), case number CV2005-007544.

2. PacifiCorp and PacifiCorp, L.L.C. received copies of the Alias Summons and First Amended Complaint on May 24, 2005, when served in Oregon, copies of which, along with other filings from the state court, are attached as Exhibit A. Defendant's Notifice of Filing Notice of Removal in Federal Court is attached as Exhibit B.

3. Plaintiffs in this action are residents of the State of Arizona.

4. PacifiCorp is an Oregon corporation with its principal place of business in Oregon. PacifiCorp, L.L.C. is a Delaware limited liability company with its principal place of business in Oregon. S.D. Myers, Inc. is a corporation duly organized and existing under Ohio law.

5. This is a civil action between citizens of different states and the amount in controversy as to each defendant, exclusive of interest and costs, exceeds the jurisdictional minimum.

6. Venue is proper in this district and division under 28 U.S.C. § 1441(a) because this district and division embraces the place in which the removal action has been pending.

7. Defendant S.D. Myers has consented to the removal of this action to this Court as shown by the Consent to Removal submitted on its behalf and filed herewith.

8. A copy of this Notice has been filed with the State Court Clerk.

June 23, 2005.

JENNINGS, STROUSS & SALMON, P.L.C.

/s/

Michael J. O'Connor
Douglas Gerlach
The Collier Center, 11th Floor
201 East Washington Street
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Attorneys for Defendants PacifiCorp
and PacifiCorp, L.L.C.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV05-1906PHX SRB

[Filed July 15, 2005]

LAWRENCE HOBBS individually; LAWRENCE and GLORIA HOBBS, husband and wife; TYLER HOBBS, JENNIFER PORTILLO, and CHRISTINE HOBBS, children, Plaintiffs,	)
v.	)
PACIFICORP, an Oregon corporation; PACIFICORP, L.L.C., a Delaware Corporation; S.D. MYERS, INC., a foreign corporation, Defendants.	)

MOTION FOR REMAND TO SUPERIOR COURT

Plaintiffs, by and through undersigned counsel, and in accordance with 28 U.S.C. § 1447(c), hereby respectfully request an Order remanding this lawsuit to the Superior Court of the State of Arizona in and for the County of Maricopa.

Remand to the Superior Court is warranted because the Notice Of Removal (filed on June 23, 2005), is untimely. The mandatory 30-day removal deadline, prescribed by 28 U.S.C. § 1446(b), expired on June 12, 2005, because the first Defendant was served on May 13, 2005. *See, e.g., Cantrell v. Great Republic Ins. Co.*, 873 F.2d 1249 (9th Cir. 1989); *Schwartz v. FHP Int'l Corp.*, 947 F.Supp. 1354, 1363 (D.Ariz. 1996).

This Motion is supported by the following Memorandum Of Points And Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. RELEVANT FACTS

1. Nature of Lawsuit

This diversity-based lawsuit arises out of the catastrophic bum injuries of 56-year old Lawrence Hobbs, a loving husband and father of three (3) children. Mr. Hobbs suffered catastrophic 2nd and 3rd degree burn injuries as a result of a transformer fire/explosion that occurred on May 8, 2003, due to the alleged negligence and misconduct of Defendants.

The transformer fire/explosion occurred at the Cholla Power Plant in Joseph City, Arizona. Mr. Hobbs was a technician at the Cholla Plant employed by APS. Mr. Hobbs was simply walking near Unit 4 when it suddenly exploded without any warning. He was badly burned by hot transformer oil that erupted from the unit.

Defendant Pacificorp owns the Cholla Plant. Defendant S.D. Myers is an outside contractor who had been servicing Unit 4 that exploded.

2. Procedural Facts

This lawsuit was filed on May 5, 2005, in the Maricopa County Superior Court under Case No. CV 2005-007544. The Original Complaint was served as follows:

Defendant	**Date of Service of Summons & Complaint**
S.D. Myers	May 13, 2005
Pacificorp L.L.C.	May 16, 2005

More than 30 days after Defendant S.D. Myers was served, S.D. Myers filed (on June 23, 2005), its Consent/Joinder to the Notice Of Removal that was filed by Defendant Pacificorp on that same day.

Shortly after the Original Complaint was served upon each Defendant, Plaintiffs were informed the true name for Defendant Pacificorp L.L.C. was actually "Pacificorp," an Oregon Corporation. Due to the incorrect naming, *and solely for that reason,* Plaintiffs filed an Amended Complaint on May 20, 2005. The Amended Complaint contained no new theories. The Amended Complaint was served upon Defendant Pacificorp on May 24, 2005, and upon Defendant S.D. Myers on May 25, 2005.

II. LEGAL ANALYSIS

As discussed below, the removal statutes are narrowly and strictly construed against removal. All doubts are resolved in favor of remand. Pursuant to 28 U.S.C. § 1446(b), the deadline to file a Notice Of Removal expires **THIRTY** (30)

days after service of the Complaint. The deadline is mandatory.

Here, the Notice Of Removal was erroneously filed **FOURTY-ONE** (41) days after the original Complaint was served. Thus, the removal was filed **ELEVEN** (11) days past the mandatory 30-day deadline, because the Complaint was served on May 13, 2005, and the Notice of Removal was not filed until June 23, 2005.

As demonstrated below, the lawsuit should be summarily remanded due to the untimely Notice Of Removal.

1. Standards For Removal

Removal is not favored by the Federal Court system. It is the longstanding principle that removal statutes are to be narrowly and "strictly **construed *against*** removal." *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09, 61 S.Ct. 868, 872, 85 L.Ed. 1214 (1914).

The burden to remove the case to Federal Court is placed upon the party seeking removal to establish all the requirements of the removal statutes. *Smith v. Voss Oil Co.*, 166 F.Supp. 905, 907 (D.Wyo. 1958). A case "**should not be removed if there is doubt as to the right of removal**." *Id.* The right to removal exists only where Congress has so designated. *Smith*, 166 F.Supp. at 906.

Thus, it is hornbook law that the "**removal statutes 'are to strictly construed against removal and *all doubts* should be resolved *in favor of remand*.'**" *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990), *cert. denied*, 498 U.S. 1085, 111 S.Ct. 959, 112 L.Ed.2d 1046 (1991). Simply put, the removal statutes "**must be construed in favor of**

state court jurisdiction." *McHugh v. Physicians Health Plan of Greater St. Louis, Inc.*, 953 F.Supp. 296 (E.D.Mo. 1997).

It is further well-established that the "**removing party bears the burden of establishing the propriety of removal.**" *Groh v. Groh*, 889 F.Supp. 166, 169 (D.N.J. 1995). The "**burden of establishing federal jurisdiction rests on the party seeking removal.**" *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97, 42 S.Ct. 35, 37, 66 L.Ed. 144 (1921); *Miller v. Grgurich*, 763 F.2d 372, 373 (9th Cir. 1985); *Salverson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1426 (9th Cir. 1984).

It has further been held by this District that the "**defendant also has the burden of showing that it has complied with the procedural requirements for removal.**" *Schwartz v. FHP Int'l Corp.*, 947 F.Supp. 1354, 1360 (D.Ariz. 1996).

2. **The Mandatory 30-Day Deadline For Removal**

The removal statute contains an explicit 30-day deadline for removing a civil action.

> The notice of removal of a civil action or proceeding ***shall*** be filed ***within thirty days*** after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. § 1446(b).

The failure to file a removal notice within the 30-day deadline can, alone, serve as a sufficient basis for remand. *Foster v. Mutual Fire, Marine & Inland Ins. Co.*, 986 F.2d. 48, 50-53 (3d Cir. 1993).

Consistent with the longstanding concept that the removal statutes are to be "narrowly and strictly construed," federal authorities are in accord that **compliance with the 30-day deadline is "*mandatory*."** *See, e.g., United States ex rel. Walker v. Gunn*, 511 F.2d. 1024, 1026 (9th Cir.), *cert. denied*, 423 U.S. 849, 96 S.Ct. 91, 46 L.Ed.2d 72 (1975); *Krantz v. Boneck*, 599 F.Supp. 785, 786 (D.Nev. 1984). *See generally*, 14C Wright & Miller & Cooper, *Federal Practice and Procedure*, § 3732 at p. 324.

4. The Mandatory 30-Day Removal Deadline Runs From The Date The First Defendant Is Served

Evidently, Defendants will request this Court to disregard the "first-served" defendant rule (adopted in the District Court of Arizona and the "majority rule" in the Federal Court system) - a rule holding that the mandatory 30-day removal deadline begins to run from the date the first defendant is served. Under the rule, a later-served defendant is barred from removing the case if an earlier-served defendant missed the mandatory 30-day removal/joinder deadline.

It is the rule in the District Court of Arizona, the prevailing rule in the Ninth Circuit, and the "majority rule" in the Federal Court system that the mandatory 30-day removal deadline runs from the date the first defendant is served. This rule is known as the "first-served" defendant rule. The District Court of Arizona adopted the majority "first-served" defendant rule nearly a decade ago. The Honorable Roslyn O. Silver delivered the opinion:

> **Pursuant to 28 U.S.C. § 1446(b),** ***the time for filing the notice of removal begins to run on the date the first defendant receives a copy of the complaint,*** through service or otherwise.

Schwartz v. FHP Int'l Corp., 947 F.Supp. 1354, 1363 (D.Ariz. 1996).

Judge Silver could not have been any more precise. In *Schwartz*, remand was ordered because a co-defendant failed to join in the removal within 30-days of the time that it had received notice of the lawsuit. Just as in *Schwartz*, Defendant S.D. Myers, in this lawsuit, failed to file a joinder in the removal (or its own notice of removal) within 30-days from the time it had been served. As a consequence, the controlling *Schwartz* decision compels that this lawsuit be remanded as well.

It is of significance that *Schwartz* heavily relied upon the decision of *Teitelbaum v. Soloski*, 843 F.Supp. 614 (N.D.Cal. 1994). Like *Schwartz*, the *Teitelbaum* case adopted the "first-served" defendant rule which requires joinder in the removal, *by all served defendants,* **from the date the first defendant is served:**

> **Because all defendants must join, the 30-day period for removal commences to run** ***from the date the first defendant receives a copy of the complaint.*** *Brown v. Demco, Inc.*, 792 F.2d 478, 481-82 (5th Cir. 1986); *Transport Indem. Co. v. Financial Trust Co.*, 339 F.Supp. 405 (C.D.Cal. 1972).

Teitelbaum, 843 F.Supp. at 615.

As quoted in the foregoing excerpt, *Teitelbaum* relied upon the Ninth Circuit case of *Transport Indemnity Co. v. Financial Trust Co.*, 339 F.Supp. 405 (C.D.Cal. 1972). The *Transport Indemnity Co.* case decided over thirty years ago held that a later-named defendant is barred from removing if an earlier named defendant failed to comply with the 30-day removal deadline:

> If, as I have heretofore found, **failure of a defendant to move for removal within the thirty-day period is equivalent to a decision not to remove, I conclude that such decision is irrevocable.** To hold otherwise would have the effect of extending the thirty-day limitation as applied to that defendant for an indefinite period during which other defendants not originally served are found and served.

Transport Indemnity Co., 339 F.Supp. at 409.

Just as adopted by the District Court of Arizona, the "first-served" defendant rule is the "majority rule" in the Federal Court system. As commented by one District Court located in the Ninth Circuit:

> The Ninth Circuit has not yet addressed the issue. **The majority of courts have held that the thirty-day removal period begins to run for all defendants on the date the first defendant receives the initial complaint - the 'first served' rule.** *See Olsen v. Foundation Health Plan, et al.*, 1999 WL 390842, at * 2 (N.D.Cal. June 11, 1999); *see, e.g., Brown v. Demco, Inc.*, 792 F.2d 478 (5th Cir. 1986) (applying 'first served' rule); *Innovacom, Inc. v. Haynes, et al.*, 1998 WL 164933 (N.D.Cal. March 17, 1998) (same); *Weimer v. City of Johnstown*, 931 F.Supp. 985

(N.D.N.Y. 1996) (same); *Teitelbaum v. Soloski*, 843 F.Supp. 6[illegible] C.D.Cal. 1994) (stone); *D. Kirschner & Sons, Inc. v. Continental Casualty Co.*, 805 F.Supp. 479, 482 (E.D.Ky. 1992) (same); *Transport Indemnity Co. v. Financial Trust Co.*, 339 F.Supp. 405 (C.D.Cal. 1972) (same).

McNally Enterprises, Inc. v. McNally, 107 F.Supp.2d 1223, 1226 (C.D.Cal. 2000).

In *McNally*, it was held that the defendant who was added in an amended complaint did not have the right to remove the case since the originally named defendant failed to remove within thirty days:

> Turning to the facts of this case, **this Court finds the reasoning of the courts following the majority rule to be more persuasive, especially in light of the rule requiring removal statutes to be construed narrowly. In the instant action, because federal jurisdiction here is based on diversity, concerns of comity favor construing the removal statutes even more narrowly.**

McNally Enterprises, Inc., 107 F.Supp.2d at 1229.

Equally on point in the Ninth Circuit (Nevada), *Biggs Corp. v. Wilen*, 97 F.Supp.2d 1040 (D.Nev. 2000), equally barred removal by a later-named defendant.

> It is the determination of this court that **the better rule is the one espoused by the Fifth Circuit and this court several years ago in *Pic-Mount* that the 30-day period for removal commences upon service of the first defendant. First, removal statutes are to be**

> **strictly construed.** The party invoking the removal jurisdiction of federal courts bears the burden of establishing federal jurisdiction over the state court suit. [citation omitted] Moreover, because the effect of removal is to deprive the state court of an action properly before it, removal raises significant federalism concerns [citation omitted], which mandate strict construction of the removal statute [citation omitted]. **As a result, courts are to resolve doubts concerning removability in favor of remanding the case to state court.** *See id.*
>
> **In addition, there is nothing inequitable about requiring the first-served defendant to file its notice of removal within its 30-day removal period.**

Biggs Corp., 97 F.Supp.2d at 1045.

Thus, under the "first-served" defendant rule adopted by *Schwartz*, *supra*, *Teitelbaum*, *supra*, *Transport Indemnity Co.*, and the "majority" of circuits in the Federal Court system, joinder of all co-defendants ***must*** occur within 30 days from the date the ***first defendant*** is served. Removal statutes are narrowly and strictly construed. All doubts are resolved against removal. The deadline is mandatory.

In this lawsuit, the first Defendant served was Defendant S.D. Myers on May 13, 2005. Thus, Defendant S.D. Myers had 30-days - until June 12, 2005 (and no later) - to join in a Notice Of Removal or file its own removal. Defendant S.D. Myers did not file its joinder in the removal until June 23, 2005.[1] Consequently, it is self-evident that removal is

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[1] Defendant Pacificorp, L.L.C. *appears* to be represented by the same counsel as Pacificorp. However, defense counsel for

absolutely barred here because the joinder by Defendant S.D. Myers was **ELEVEN** (11) days too late. A late joinder cannot be used to circumvent the missed deadline.

It is further well to consider that the first-served Defendant in this lawsuit (S.D. Myers) plainly had no intention of removing this case to Federal Court. First, Defendant S.D. Myers never filed a Notice Of Removal within thirty days. Second, Defendant S.D. Myers proceeded to actively litigate this lawsuit in the Superior Court by filing an Answer and concurrently serving a Request For Production, Non-Uniform Interrogatories, and Uniform Interrogatories upon Plaintiffs (attached as **Exhibit "A"**). The Answer and the Discovery served by Defendant S.D. Myers occurred *before* it joined in the Notice Of Removal.

In light of the foregoing facts and authorities, Plaintiffs respectfully submit that remand is warranted.

5. An Amended Complaint Does Not Re-Start The 30-Day Removal Deadline

Plaintiffs are further informed that Defendants may contend that the mandatory 30-day deadline was somehow extended because Plaintiffs filed and then served an Amended Complaint.

It has long been the rule in the Ninth Circuit that the filing and serving of an Amended Complaint does not restart the 30-day deadline for removal provided the

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Pacificorp and Pacificorp, L.L.C. stresses that the entities are unrelated and he really does not represent Pacificorp, L.L.C. If that is true, then there is no valid "joiner" in the removal by Defendant Pacificorp, L.L.C.

original Complaint was removable. *Cantrell v. Great Republic Ins. Co.*, 873 F.2d 1249 (9th Cir. 1989).

In *Cantrell* the defendant named in the original complaint failed to remove within the 30-day deadline. The amended complaint added a new defendant who filed a notice of removal, which was joined by the first defendant. No new theories were alleged in the amended complaint. The Ninth Circuit Court of Appeals reversed the denial of the motion for remand:

> **There is nothing about the addition of a party plaintiff or defendant in the context of this action that either creates federal jurisdiction or makes the fact of federal jurisdiction newly ascertainable.**
>
> * * *
>
> **Accordingly, appellees lost their opportunity to remove the case when they failed to file a petition for removal within thirty days of the filing of the original complaint.**

Cantrell, 873 F.2d at 1255, 1256.

Cantrell is on "all fours" here and should be applied to remand this case.

Equally on point within the Ninth Circuit is the case of *Samura v. Kaiser Foundation Health Plan, Inc.*, 715 F.Supp. 970, 971 (N.D.Cal. 1989), in which it was held that a later-added defendant was barred from removing the case due to the fact that an earlier-served defendant failed to remove within the thirty-day deadline.

An excellent discussion of this rule is also found *Henderson v. Holmes,* 920 F.Supp. 1184 (D.C.Kan. 1996). A leading treatise on Federal Practice and Procedure also contains the following excerpt:

> Thus an amendment of the complaintt will not revive the period for removal if a state court case previously was removable but the defendant failed to exercise his right to do so; the result will be the same when any other changes in the case occurs or any paper is interposed revealing a ground for removal to federal court that was previously palpable or ascertainable but was not invoked by the defendant.

Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 3d* § 3732 at p. 318 (and authorities listed therein, including *Cantrell, supra*).

Based on the foregoing authorities, it is self-evident that the Amended Complaint in this lawsuit does not re-start the deadline for removal, especially since the original Complaint was perfectly removable by Defendant S.D. Myers if it wanted to, and the Amended Complaint added no new theories.

CONCLUSION

Based on well-settled authorities in the District Court of Arizona and throughout the Ninth Circuit, **removal is barred if the Notice of Removal is filed more than thirty (30) days after the first defendant is served**. The 30-day removal deadline prescribed 28 U.S.C. § 1446(b) is mandatory and is to be narrowly and strictly construed, with all doubts resolved in favor of remanding to state court. The filing of an amended

complaint (with no new theories) does not restart the 30-day deadline.

Here, Defendant S.D. Myers was served on May 13, 2005. Consequently, the 30-day deadline to remove expired on June 12, 2005. The Notice Of Removal was untimely because it was filed on June 23, 2005 (**ELEVEN** (11) days past the deadline).

In accordance with the foregoing, Plaintiffs respectfully request this Court enter an Order remanding this case to the Maricopa County Superior Court. Plaintiffs further request attorneys fees and costs pursuant to 28 U.S.C. § 1447(c).

DATED this 15th day of July, 2005.

CHARLES M. BREWER, LTD.

By /s/ Dane Wood
Dane L. Wood
5500 North 24th Street
Phoenix, Arizona 85016
Attorney for Plaintiffs

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 2005-1906-PHX-SRB

[Filed August 1, 2005]

LAWRENCE HOBBS, individually; LAWRENCE and GLORIA HOBBS, husband and wife; TYLER HOBBS, JENNIFER PORTILLO and CHRISTINE HOBBS, children, Plaintiffs,	)
vs.	)
PACIFICORP, an Oregon corporation; PACIFICORP, L.L.C., a Delaware corporation; S.D. MYERS, INC., a foreign corporation; JOHN DOES and JANE DOES I-X; ABC PARTNERSHIPS I-X, inclusive; and BLACK CORPORATIONS I-X, inclusive, Defendants.	)

PACIFICORP'S RESPONSE IN OPPOSITION TO MOTION TO REMAND TO SUPERIOR COURT

I. INTRODUCTION

PacifiCorp respectfully opposes Plaintiffs' motion to remand and requests that this Court deny the motion and retain jurisdiction of this properly removed diversity matter. Plaintiffs' motion incompletely sets forth the federal and legal fi'amework to rule on this remand motion. In fact, Plaintiffs' motion:

(a) ignores the material chronology of events (the removal and joinder were both filed within 30 days of the operative complaint); and

(b) apply the so-called "first-served defendant rule" even though it is not necessary under the specific facts in this case," thus:

(i) ignoring that this Court is not bound by any applicable case authority to apply the first-served defendant rule [*e.g., Griffith v. American Home Prods. Corp*, 85 F.Supp.2d 995, 1000-01 (E.D. Wash. 2000) (concluding that the Ninth Circuit has not adopted the first-served defendant rule)];

(ii) ignoring the policy reasons that, here, militate against application of the "first-served defendant rule" [*see e.g.*, discussion in *Ford v. New United Motors Mfg.*, 857 F. Supp. 707, 709-10 (N.D. Cal. 1994)]; and

(iii) ignoring that, for fairness reasons, the modern trend is away from the first-served defendant rule [16 James Wm. Moore, *Moore's Federal Practice,* § 107.05 at 107-28 (3d ed. 2005)

> ("[I]n the context of multiple defendants, the trend is to permit each defendant 30 days in which to remove")].

As set forth below, under the particular facts of this case, this Court need not decide whether to adopt the first-served defendant rule, a rule that has not been adopted in Arizona or the Ninth Circuit, because procedurally, the removal to federal court was appropriate and should stand. Because Plaintiffs filed an amended complaint prior to any answers, the 30-day removal deadline did not begin until Plaintiffs served the Defendants with the amended complaint. Plaintiffs' cases stating generally that amended complaints do not "re-start" the deadline for removal thus are easily distinguishable. Moreover, even if the Court were to consider the first-served defendant rule, it should not grant Plaintiffs' motion to remand. Plaintiffs ask this Court to adopt the rule without the slightest hint of prejudice to Plaintiffs if the removal stands (because no prejudice exists), and without regard for how the first-served defendant rule would penalize the later-served defendant, which here is PacifiCorp. Plaintiffs' motion urges application of the rule as if it were an iron law, to be applied mindlessly, which it is not. There is no Arizona authority which dictates the use of the first-served defendant rule, nor any authority that would dictate its use under the particular facts of this case. Accordingly, Plaintiffs' motion should be denied.[1]

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[1] Plaintiffs' also assert that the case should be remanded to state court because not all Defendants joined. However, case law is clear that if a "nominal, unknown, or fraudulently joined" party is named, failure of that party to join in removal will not defeat the motion. *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1193 (9th Cir. 1988). Here, PacifiCorp L.L.C. is even less than a nominal party because it is not related in any way to PacifiCorp and has

II. PACIFICORP'S MOTION TO REMOVE WAS TIMELY FILED IN LIGHT OF THE FACT THAT NO-ACTION OCCURRED BY ANY DEFENDANT UNTIL THE AMENDMENT WAS SERVED

Plaintiffs' motion omits the material events that fully discuss the timeliness of removal. The table below identifies all events in this action that are relevant.[2]

Date	Event
May 5	Complaint filed
May 13	Service on defendant Myers
May 20	Amended complaint filed
May 24	Service of amended Complaint on PacifiCorp

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absolutely nothing to do with this matter. *See* Affidavit of John Marshall Monson (July 28, 2005) (Exhibit A). Plaintiffs have been provided documentation that PacifiCorp L.L.C. is not related to PacifiCorp. Despite several correspondences with Plaintiffs regarding this issue, they have yet to voluntarily dismiss PacifiCorp L.L.C. from this action. *See* Affidavit of Michael J. O'Connor (July 29, 2005) (Exhibit B).

[2] PacifiCorp L.L.C. was a Defendant named in both the original and amended complaints, and apparently service was at least attempted on PacifiCorp L.L.C. It is important to note, however, that PacifiCorp L.L.C. is not related to Defendant PacifiCorp and is, instead, a shell corporation created by a Texas resident that has never been used. *See* Monson Affidavit. As such, service on PacifiCorp L.L.C. has no bearing on the removal/remand issues here because PacifiCorp L.L.C. has nothing to do with this case.

May 25	Service of amended complaint on Myers
June 20	Answer filed by Myers to original (void) complaint
June 23	Removal by PacifiCorp, joined by Myers
June 29	Answer filed by PacifiCorp
June 29	Answer filed by Myers to Amended Complaint

As discussed more fully below, Plaintiffs' support for the proposition that an amended complaint does not re-start the 30-day removal deadline differs drastically from the facts of this case. In those cases, defendants actively litigated in state court until months or years later when a new defendant was added through an amended complaint and sought to remove the action to federal court. The rationale is that the first-served defendant should not get to see how his case is fairing in state court and then much later decide to remove it to federal court and start over. In those cases supporting Plaintiffs' position, the first-served defendant had been actively litigating in state court for a considerable time before the new defendant sought removal. For example, in *Cantrell v. Great rep. Ins. Co.,* 873 F.2d 1249 (9th Cir. 1989), the court would not allow a new defendant to remove the case to federal court when it was added **two years** after the first defendant was served with the original complaint in a case that the original defendant had been **actively litigating** in state court. Similar results have been obtained in other cases cited by Plaintiffs including *McAnally Enter., Inc. v. McAnally,* 107 F.Supp.2d 1233 (C.D. Cal. 2000) (holding that a new defendant added **20 months** after the case had been **actively litigated** in state court by the first-served defendant could not

remove the case); *Brown v. Demco, Inc.*, 792 F.2d 478 (5th Cir. 1986) (remanding case to state court where first served defendant had been **actively litigating** the case in state court for **four years** before new defendant was added and attempted removal); *Samura v. Kaiser Foundation Health Plan, Inc.*, 715 F. Supp. 970 (N.D. Cal. 1989) (removal not timely when first served defendant had **actively litigated** the case in state court for **seventeen months** prior to adding a new defendant who sought removal). The facts supporting remand to state court for failure to timely remove in all of these cases are clear: these courts did not allow defendants to re-start the 30-day removal deadline when the case was (1) already actively litigated in state court, (2) for a considerable period of time.

In the present case, the initial complaint was filed against Myers and PacifiCorp L.L.C., a company with absolutely no relationship to PacifiCorp. Within days, and most importantly, prior to an answer as allowed under Rule 15 A.R.C.P., Plaintiffs filed their amended complaint. At the time the amended complaint was filed, there was **no active litigation** occurring in state court. No party had answered the complaint and no actions were taken to further the litigation. PacifiCorp, after being properly named and served with the now operative amended complaint, removed the matter to federal court based on diversity jurisdiction by June 23, 2005, less than thirty days after it had been served. Because there was **no active litigation in state court** and the new defendant, PacifiCorp, was added before any litigation in state court began, it follows that the 30 days allowed for removal began running not from the date that the original complaint was filed, but rather, from the date that PacifiCorp and Myers were served with the amended complaint.

This result is consistent with Rule 15 A.R.C.P. Here, it is undisputed that Plaintiffs' amended complaint was

substituted for the original prior to any appearance by a Defendant. This substituted amendment supersedes Plaintiffs' original complaint. *See e.g., Sacramento Coca-Cola Bottling Co. v. Teamsters & Helpers Local No. 150,* 440 F.2d 1096, 1098 (9th Cir. 1971) ("[An] amended complaint supersedes the original, the latter being treated thereafter as non-existent"); *Ferdik v. Bonzelet,* 963 F.2d 1258, 1262 (9th Cir. 1991) ("amended pleading supersedes the original pleading"); *Mohave Concrete and Materials v. Scaramuzzo,* 154 Ariz. 28, 30, 739 P.2d 1345, 1347 (Ct. App. 1987) ("because two complaints cannot coexist in the same action, the filing of a substituted or amended complaint must of necessity remove the original pleadings from the file"). Thus, when Plaintiffs filed the amended complaint, the original complaint was no longer in effect. Because no litigation took place between the filing of the original and amended complaints, it follows that the time for removal should be calculated from when PacifiCorp and Myers were served for the first time, with the amended complaint. Therefore, PacifiCorp's removal of the case 30 days later was appropriate. Moreover, Plaintiffs also served that amended complaint on Myers fewer than 30 days before it joined in the removal.[3]

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[3] As explained below, the service of the original complaint on Myers, should not, consistent with the modern trend in the law, preclude it from joining a removal as opposed to initiating it. Although Myers filed an answer before joining in the removal, filing an answer before removal does not waive one's right to remove. *See Haun v. Retail Credit Co.,* 420 F. Supp. 859, 864 (D.W.V. 1976) ("The Court therefore holds that a defendant does not waive his right to remove when he answers in state court and then files a petition for removal timely under § 1446(b)"); *Estevez-Gonzalez v. Kraft, Inc.,* 606 F. Supp. 127, 129 (S.D. Fla. 1985) ("the mere filing of a responsive pleading is generally held not to constitute a waiver").

The cases cited by Plaintiffs that hold that an amended complaint does not extend the time for removal **have no applicability** here. In each of those cases, litigation at the state court level had not only begun but had proceeded in such a way that the defendants had in essence voluntarily submitted to the state court's jurisdiction and therefore were not allowed to later withdraw from it. This case drastically differs from those cases cited by Plaintiffs because the case was not actively litigated in state court. Because no action had occurred in the litigation prior to the filing of the amended complaint and the amended complaint supersedes the original, the time for filing responsive pleadings **and** the time for removal should run from the date of service of the amended pleading. Plaintiffs' authority simply does not apply under the present facts.

III. THE "FIRST-SERVED DEFENDANT RULE" MUST BE REJECTED

Even setting aside the timely removal of the amended complaint as set forth above, this Court should still determine the removal as timely by rejecting the "first-served defendant rule" in this case.

A. *The First-Served Defendant Rule is Not Precedent in Arizona*

Plaintiffs' motion's assertion (at p. 6) that the District of Arizona has adopted the first-served defendant rule is based exclusively on a misreading of *Schwartz v. FHP Int'l Corp.*, 947 F. Supp. 1354 (D. Ariz. 1996). Whether the time for removal should begin with service on the first defendant was never an issue that the court had to consider in *Schwartz,* since not all of the defendants joined in the removal in that case. 947 F. Supp. at 1360. Instead, defendant FHP sought

removal on the grounds that the court had exclusive jurisdiction over the claims, and thus, joinder of all defendants in the removal was not required, or alternatively, that the claims asserted against FHP were separate and independent, thus permitting FHP to remove solely on its behalf. The court rejected FHP's arguments, leaving it to decide whether removal was still permitted. And, because not all defendants had joined, there was no alternative but to remand, and no reason to consider whether the first-served defendant rule was to be applied. Therefore, despite Plaintiffs' assertion that Arizona has adopted this rule, it is clear that the ruling in *Schwartz* did not address it and the Ninth Circuit has adopted no such rule. *See e.g., Griffith v. American Home Prods. Corp,* 85 F.Supp.2d 995, 1000-01 (E.D. Wash. 2000) (concluding that the Ninth Circuit has not adopted the first-served defendant rule).

B. *Public Policy Dictates Reasons to Reject the First-Served Defendant Rule*

The first-served defendant role was prompted by attempts to adhere to the requirement imposed by the removal statute [28 U.S.C. § 1446(b)] that all served defendants remove, or consent to removal, within 30 days of service. Thus, courts have suggested that the first-served defendant rule is an attempt to effect the purposes for the 30-day limitation, which are "two-fold: to deprive the defendant of the undeserved tactical advantage that he would have if he could wait and see how he was faring in state court before deciding to remove the case to another court system; and to prevent the delay and waste of resources involved in starting a case over in a second court after significant proceedings, extending over months or even years, may have taken place." *Wilson v. Intercollegiate (Big Ten) Conference Athletic Ass 'n,* 668 F.2d 962, 965 (7th Cir. 1982). When, as here, neither of those purposes will be

adversely affected by removal and the failure to allow the removal would be unfair to the later-served defendant (PacifiCorp), then there is no warrant to apply the first-served defendant rule. *E.g., Eltman v. Pioneer Communications of Am., Inc.*, 151 F.R.D. 311, 317 (N.D. Ill. 1993) (denying motion to remand); *see also Ford v. New United Motors Mfg., Inc.*, 857 F. Supp. 707, 709-10 (N.D. Cal. 1994) (denying motion to remand).

Given that this matter was commenced in early May, it can hardly be said that the Defendants are trying to escape a state court where they have not fared well. Moreover, because the original complaint was filed less then three months ago, and the first scheduling conference has yet to take place, there will be no delay or waste of resources from having to start a matter over after it has been pending in state court for a considerable time. Indeed, this Court's prompt setting of the initial scheduling conference likely means that this case will soon be further along than if the matter had remained in state court. Correctly understood, many of the case authorities on which the motion relies were significantly influenced by a concern about inevitable delays that accompany removals attempted after the litigation was well underway.[4] For example, in *Cantreli v. Great Republic Ins. Co.*, 873 F.2d 1249, 1254 (9th Cir. 1989), not only was the notice of removal filed two years after the start of the lawsuit, but by a party that, although not formally served, had answered the complaint and actively participated in the litigation before being served. Likewise, in *McAnally Enters. v. McAnally*, 107 F.Supp.2d 1223, 1229 (C.D. Cal. 2000), "[the] case

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[4] As discussed above, this Court need not even consider the first-served defendant rule because the acts of this particular case render its application unnecessary.

ha[d] been litigated in state court for a substantial amount of time - one and a half years" before the attempted removal, and in *Samura v. Kaiser Fdn. Health Plan, Inc.*, 715 F. Supp. 970 (N.D. Cal. 1989), removal came seventeen months after the complaint was filed.[5]

Recently, moreover, especially in light of the Supreme Court's decision in *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999) where the court moved away from a strict, rigid construction of the removal statute, courts have taken a second look at the removal statute and concluded that it does not justify the first-served defendant rule. "[A]s a matter of statutory construction, holding that the time for removal commences for all purposes upon service of the first defendant would require us to insert 'first' before 'defendant' into the language of the [removal] statute... If Congress had intended the 30-day removal period to commence upon service of the first defendant, it could have easily so provided." *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999) (citation omitted), *cert. denied,*

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[5] Other authorities on which the motion relies are also, for other reasons, significantly different from what has happened here. For example, in *Transport Indem,* 339 F. Supp. at 407, 409, the two defendants, unlike here, had mutual interests, being parent and wholly owned subsidiary, and so, when the parent allowed thirty days to pass without removing, it was fair and equitable to say that its failure to act was also attributable to the subsidiary, such that the subsidiary could not remove. In *Teitelbaum v. Soloski,* 843 F. Supp. 614, 615 (C.D. Cal. 1994), one defendant not only filed its joinder in the removal more than 30 days after it was served, but also, unlike here, more than 30 days after the other defendant was served, thus making the joinder untimely.

528 U.S. 1076 (2000); *accord Griffith,* 85 F.Supp.2d at 1001 (concluding that "if Congress intended one thirty-day period for removal when it enacted § 1446(b), it could have clearly done so"); *see also McKinney v. Board of Trustees of Maryland Com. College,* 955 F.2d 924, 926 (4th Cir. 1992) (concluding that nothing in the language or legislative history of the removal statute implies a first-served defendant rule); *Ford v. New United Motors Mfg., Inc.,* 857 F. Supp. 707, 709-10 (N.D. Cal. 1994) (denying remand motion: "By its express terms, section 1446(b) does not address the time period for removal in actions involving staggered service of multiple defendants" and "[i]f Congress had intended the thirty-day removal period to commence in all cases upon service of the first defendant, it could have easily stated as such"). Moreover, a fair reading of section 1446(b) warrants the conclusion that it places a 30-day limit on a defendant's right to initiate removal, but is silent about, and therefore does not impose a time limit on, a defendant's ability to join another defendant's removal. *See McAnally,* 107 F.Supp.2d at 1229 (quoting *Goularte v. ABEX Corp.,* 1997 WL 294397, at *2 (N.D. Cal. May 28, 1997)).[6]

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[6] The Supreme Court's decision in *Murphy Bros.* has led many lower courts to conclude that the days when the removal statute would be narrowly and rigidly construed are gone. *E.g., Marano Enters. v. Z-Teca Restaurants, L.P.,* 254 F.3d 753, 756-57 (8th Cir. 2001) (concluding that, given *Murphy Bros.,* it is likely that, today, the Supreme Court "would allow each defendant thirty days after receiving service within which to file a notice of removal, regardless of when - or if previously served defendants had filed such notices"(emphasis added)); *Griffith,* 85 F.Supp.2d at 1000-01 (concluding that *Murphy Bros.* "stands for the proposition that the removal statute should not be so strictly construed as to deny defendants significant procedural rights"); *see also 16 Moore's Federal Practice,* §107.3013][a] at 107-163 (stating that, in *Murphy Bros.*, the Supreme Court "implicitly rejected the policy to

C. *Principles of Fairness Mandate aRejection of the First-Served Defendant Rule*

Plaintiffs' motion fails to consider that the removal statute should be applied in a way that is fair to both Plaintiffs and Defendants. *E.g., McKinney,* 955 F.2d at 927. Given that the complaint was filed only recently, the motion did not and could not demonstrate any prejudice to the Plaintiffs that will follow if the removal is allowed. On the other hand, granting the motion would deny PacifiCorp an opportunity to remove simply because Myers initially decided not to do so. In such circumstances, fairness warrants allowing Defendants, like PacifiCorp, "the opportunity to persuade the earlier served defendant[] to join the notice of removal" [16 *Moore's Federal Practice,* §107.3013][a] at 107-163], which is what happened here.

IV. CONCLUSION

The facts of this case make it unnecessary for this Court to decide if the first-served defendant rule should be applied. The fact is, no litigation occurred prior to Plaintiffs' filing their amended complaint and therefore the amended complaint supersedes and nullifies the original. Moreover, even if the Court were to consider the first-served defendant rule, it should be denied in this action not only because the case was not actively litigated prior to the amendment, but also because it is against public policy and fairness as it relates to the particular facts in this matter. Defendants therefore pray that the motion for remand be denied.

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construe the removal statute strictly").

DATED this 29th day of July, 2005.

JENNINGS, STROUSS & SALMON, P.L.C.

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APPENDIX M

**IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

No. CV2005-007544

[Filed August 2, 2005]

LAWRENCE HOBBS individually; LAWRENCE and GLORIA HOBBS, husband and wife; TYLER HOBBS, JENNIFER HOBBS, and CHRISTINE HOBBS, children, Plaintiffs,	)
v.	)
PACIFICORP, L.L.C., a Delaware corporation; S.D. MYERS, INC., a foreign corporation; et al. Defendants.	)

DEFENDANT S.D. MYERS, INC. JOINDER IN PACIFICORP'S RESPONSE IN OPPOSITION TO MOTION TO REMAND TO SUPERIOR COURT

S. D. Myers, Inc. hereby joins in with Pacificorp's Response in Opposition to Motion to Remand to Superior Court.

RESPECTFULLY SUBMITTED this 2nd day of August, 2005.

RENAUD COOK DRURY MESAROS, PA

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APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV05-1906PHX SRB

[Filed August 8, 2005]

LAWRENCE HOBBS individually; LAWRENCE and GLORIA HOBBS, husband and wife; TYLER HOBBS, JENNIFER PORTILLO, and CHRISTINE HOBBS, children, Plaintiffs,	)
v.	)
PACIFICORP, an Oregon corporation; PACIFICORP, L.L.C., a Delaware Corporation; S.D. MYERS, INC., a foreign corporation, Defendants.	)

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR REMAND TO SUPERIOR COURT

Plaintiffs, by and through undersigned counsel, hereby respectfully submit this Reply in support of their Motion For

Remand To Superior Court. Plaintiffs request this Court to summarily remand this case to the Superior Court.

1. **Under *Schwartz v. FHP Int'l Corp.*, Removal Is Prohibited Because The Notice of Removal Was Filed More Than Thirty (30) Days After Service Upon The First Defendant (S.D. Myers)**

It is most significant that Defendant Pacificorp totally ignores the fact that the Notice Of Removal was filed more than **THIRTY (30)** days after the Complaint was served upon Defendant S.D. Myers. Consequently, under the dispositive case of *Schwartz v. FHP Int'l Corp.*, 947 F.Supp. 1354, 1363 (D.Ariz. 1996), removal is absolutely prohibited.

> **Pursuant to 28 U.S.C. § 1446(b), *the time for filing the notice of removal begins to run on the date the first defendant receives a copy of the complaint,*** through service or otherwise.

Schwartz v. FHP Int'l Corp., 947 F.Supp. 1354, 1363 (D.Ariz. 1996).

Somehow, someway, Defendants unexplainably dream up the idea that *Schwartz* does not apply here. Plainly, Defendants are way off the mark. *Schwartz* does apply, and it holds exactly what it states: a notice of removal must be filed within thirty days after the first defendant is served. There are no exceptions. When there is no filing of a notice of removal within the mandatory 30-day removal deadline and no joinder of *all* defendants within that same deadline *Schwartz* unequivocally holds that removal is absolutely barred. Defendant S.D. Myers did file a notice of removal or a joinder within the mandatory 30-day removal deadline. It is

meritless for Defendants to argue that *Schwartz* is inapplicable here. *Schartz* is on all fours.

Here, Defendant S.D. Myers was served on May 13, 2005. The Notice Of Removal was not filed until June 23, 2005 - **FORTY (41)** days after service of the Complaint. Thus, pursuant to the unmistakable holding of *Schwartz*, removal is prohibited here because the Notice Removal was filed **ELEVEN (11)** days after the mandatory 30-day deadline. Consistent with the longstanding concept that the removal statutes are to be "narrowly and strictly construed," federal authorities are in accord that **compliance with the 30-day deadline is "*mandatory*."** *See, e.g., United States ex rel. Walker v. Gunn*, 511 F.2d. 1024, 1026 (9th Cir.), *cert. denied*, 423 U.S. 849 96 S.Ct. 91, 46 L.Ed.2d 72 (1975).

Curiously, without any legal support whatsoever, Defendants argue the "lack of prejudice" warrants the removal of this lawsuit. Under *Schwartz*, and all the other authorities, there is no balancing of "prejudice" when a Defendant violates the mandatory 30-day removal deadline.

The fact that Defendants would suggest such an unprecedented approach, just goes to show their implicit recognition that removal is indeed prohibited under settled precedent.[1]

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[1] No explanation or excuse whatsoever is offered as to why Defendant S.D. Myers failed to file a Notice Of Removal within the mandatory 30-day removal deadline. Obviously, Defendant S.D. Myers had no intention of removing the case. Indeed, Defendant S.D. Myers even filed an Answer in the Superior Court and also served discovery, showing full intention of actively litigating the lawsuit in the Superior Court. Consequently, there is no prejudice to Defendant S.D. Myers by remanding this lawsuit.

Based on *Schwartz*, *supra*, and the majority rule throughout the nation, Plaintiffs respectfully submit that removal is prohibited and the motion for remand should be summarily denied.

2. The Amended Complaint Does Not Re-Start The Removal Deadline

It is *undisputed* the original Complaint (filed on May 13, 2005) was removable. It is further *undisputed* that Defendant S.D. Myers failed to comply with the 30-day removal deadline It is also *undisputed* the Amended Complaint did not change any facts, did not change any legal theories, and did not add any new basis for removal jurisdiction. The Amended Complaint merely corrected the name of Pacificorp.

Under well-settled precedent, the filing of an Amended Complaint does not re-start the removal deadline. *Cantrell v. Great Republic Ins. Co.*, 873 F.2d 1249, 1255 (9th Cir. 1989). Defendants offer no authority to the contrary. Instead, Defendants merely argue *Cantrell* and the other cited cases are simply factually distinguishable, specifically that those cases were being actively litigated when the Notice Of Removal was filed.

However, it is easy to see that *Cantrell* and the other cases did not turn on whether the case was being actively litigated. The keys to the decision in *Cantrell* and the other cases were that: (1) the lawsuits were removable upon service of the initial complaint; and (2) the amended complaints did not

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Any claimed prejudice to Defendant Pacificorp by remanding this case is non-existent as well.

materially change the lawsuits. Plainly, those factors are present here. Thus, under the dispositive *Cantrell* holding, the removal deadline did not re-start upon the filing of an amended complaint.

CONCLUSION

Simply put, removal is prohibited here because the Notice Of Removal was filed after the mandatory 30-day removal deadline. The removal statutes are narrowly and strictly construed against removal. All doubts are resolved in favor of remand.

The filing and service of an amended complaint does not magically rescue Defendants from complying with the mandatory 30-day removal deadline in situations such as this in which the original complaint itself was removable.

DATED this 8th day of August, 2005.

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